

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





# 74-1806

ORIGINAL

B  
2/5

**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

EXXON CORPORATION,

*Plaintiff-Appellant*

v.

THE CITY OF NEW YORK, ENVIRONMENTAL PROTECTION  
ADMINISTRATION OF THE CITY OF NEW YORK  
and ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION  
ADMINISTRATION OF THE CITY OF NEW YORK,  
*Defendants-Appellees*

GETTY OIL CO., (Eastern Operations), INC.,  
GULF OIL CO.-U.S., MOBIL OIL CORPORATION and  
SUN OIL COMPANY OF PENNSYLVANIA,  
*Plaintiffs-Appellants*

v.

THE CITY OF NEW YORK, HERBERT ELISH,  
Environmental Protection Administrator of the City of New York,  
and THE ENVIRONMENTAL PROTECTION  
ADMINISTRATION OF THE CITY OF NEW YORK,  
*Defendants-Appellees.*

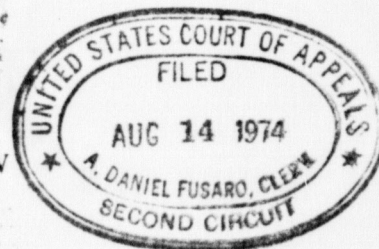
ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

**JOINT APPENDIX**

SHEARMAN & STERLING  
*Attorneys for Plaintiff-Appellant*  
EXXON CORPORATION  
53 Wall Street, New York, N.Y. 10005

SHEA, GOULD, CLIMENKO & KRAMER  
*Attorneys for Plaintiffs-Appellants*  
GETTY OIL CO., (Eastern Operations), INC.,  
GULF OIL CO.-U.S., MOBIL OIL CORPORATION  
and SUN OIL COMPANY OF PENNSYLVANIA  
330 Madison Avenue, New York, N.Y. 10017

ADRIAN P. BURKE  
*Corporation Counsel*  
The City of New York, Municipal Building  
New York, N.Y. 10007



49

PAGINATION AS IN ORIGINAL COPY



# INDEX TO APPENDIX

	<u>Page</u>
Docket .....	1a
Complaint, Exxon Corp. v. The City of N.Y. ....	7a
Complaint, Getty et al.v. The City of N.Y. ....	25a
Affidavits in Support of Plaintiff's Application for an Order to Show Cause and Motion for a Preliminary Injunction: Raymond J. Campion .....	41a
Robert L. Clare, Jr. ....	51a
Richard A. Rabinow .....	57a
Stipulation Amending Complaint of Getty et al.; January 9, 1974 .....	65a
Answer of City to Exxon .....	69a
Answer of City to Getty et al. ....	73a
Order to Show Cause re Summary Judgment, Affidavit of Miles F. McDonald and Exhibits Attached Thereto .....	77a
Stipulation Amending Complaint of Exxon; January 23, 1974 .....	105a
Stipulation of Consolidation .....	107a
Notice of Motion .....	109a
Affidavit of Kent Sinclair, Jr., In Support of Motion .....	111a
Affidavits in Opposition to Motions for Summary Judgment: Evelyn J. Junge .....	116a
William Shapiro .....	121a

	<u>Page</u>
Memorandum and Order of Judge Stewart; March 8, 1974 .....	125a
Order to Show Cause to Amend the Decision of March 18, 1974 .....	139a
Letter of Shearman and Sterling Joining in the Application on Behalf of Exxon .....	150a
Affidavit of Evelyn J. Junge in Opposition to Application to Amend Decision .....	152a
Order of U.S.D.C. Amending Prior Order of March 8, 1974 dated April 15, 1974 .....	159a
Order Granting Leave to Appeal .....	161a



8-74 consolidated for all purposes  
**CIVIL DOCKET**  
**UNITED STATES DISTRICT COURT**

Jury demand date:

73 JUL 1 1977

D. C. Form No. 106 Rev.

## TITLE OF CASE

GETTY OIL CO. (EASTERN OPERATIONS) INC GULF OIL CO.  
 U.S. MOBILE OIL CORPORATION AND SUN OIL COMPANY OF  
 PENNSYLVANIA

AGAINST

THE CITY OF NEW YORK, HERBERT BLISH ENVIRONMENTAL PRO-  
 TECTION ADMINISTRATOR OF THE CITY OF NEW YORK AND THE  
 ENVIRONMENTAL PROTECTION ADMINISTRATION OF THE CITY  
 OF NEW YORK,

## ATTORNEYS

For plaintiff:

SHEN . COULD. CLIMENKO & KRATIER  
 330 Madison Avenue,  
 N.Y.C. N.Y. 10017  
 No 1-3200

For defendant:

Adrian P. Burke  
 Municipal Bldg., NYC 10007

## STATISTICAL RECORD

## COSTS

## DATE

NAME OR  
RECEIPT NO.

## REC.

J.S. 5 mailed

X

Clerk

3/14/73

Shen &amp; Co.

15

10

J.S. 6 mailed

X

Marshal

3/15/73

Shen &amp; Co.

5

5

Basis of Action:

42 U.S.C. Clean Air Act.

Docket fee

Witness fees

Action arose at:

Depositions

Getty Oil Co., et al vs The City of N.Y. etc,

Getty Oil Co., et al Vs. The City of NY, et al

73 Civ. 1047

DATE	PROCEEDINGS	Date Ord Judgment
Mar. 14-73	Filed complaint & issued summons.	
Mar. 14-73	Filed Order to Show Cause for preliminary injunction ret. 3-15-73- Room 318 at 2 P.M.	
Mar. 14-73	Filed memorandum of law in support of plttf's application for O.S.C.	
Mar. 23, 73	Filed Plttf's Order. Ordered until 4/15/73, etc. until argument of Plttfs' appeal in Court of Appeals for 2nd Circuit, etc. officers, agents, etc. restrained from enforcing or taking steps to enforce prov. Sec. 1403.2-13.12(b) Local Law No. 49(b) imposing any fine, enjoin or attempting to enjoin, pursuant to Sec. 1403.2-15.21, etc. Stewart, J. n/n	
Mar. 23, 73	Filed Summons with Marshal's Return. James P. Pettit, person apptd by Court served Summons & Complaint on Defts on 3/14/73. (Affdvt of Service)	
Mar. 27, 73	Filed Plttf's Notice of Appeal.	
Mar. 27, 73	Filed Certificate of Clerk to Deposit in sum of \$250 in lieu of a Bond for Costs of App from order entered 3/23/73 denying plttfs' motion for temporary injunction. Acting Clk. Same was deposited in Registry of this Court, A/C/l. JE (mailed copy)	
Mar. 23, 73	Filed Suppl. Memorandum of Law in support of Plttf's Application for a preliminary injunction	
3-23-73	Filed Memorandum. I do not determine that no burden on Interstate commerce result if every state and locality were free to impose different fuel sales emission control devices or for health purposes, indicated, etc. for this motion by plttfs for a preliminary injunction is denied. So Ordered	
3-23-73	Filed Supplemental Memorandum of Law in opposition to Motion for Preliminary Injunction.	
3-23-73	Filed Affidavit in support of Defendants response.	
3-23-73	Filed Supplemental affidavit in support of Defendants response.	
3-23-73	Filed Supplemental Memorandum in opposition to Plaints' motion for preliminary injunction by Corp. Counsel city of NY	
3-23-73	Filed Affidavit in opposition to motion for Preliminary Injunction.	
	* Filed in 73 Civ 1047	
Apr. 4, 73	Filed trial transcript of record of proceedings dtd. Mar. 13/73. (consolidated w/ 73 c.	
Apr. 4, 73	Filed trial transcript of record of proceedings dtd. Mar. 15/73. (consolidated w/ 73 c.	
Apr. 4, 73	Filed trial transcript of record of proceedings dtd. Mar. 15/73. (consolidated w/ 73 c.	
Apr. 4, 73	Filed trial transcript of record of proceedings dtd. Mar. 15/73. (consolidated w/ 73 c.	
Apr. 5, 73	Filed Notice to Docket Clerk that record on appeal has been transmitted to U.S. Court of Appeals for 2nd Circuit on 4/5/73.	
Apr. 11-73	Filed testimony before the N.Y. City Environmental Administration.	
Apr. 11-73	Filed Supplemental Record on Appeal to the USCA.	
Apr. 15, 73	Filed Notice of Deposition of Vincent Guinee, M.D. Dir. Bureau of Lead Poisoning Control, Dept. of Health, City Of NY	
May 24-73	Filed true copy of MANDATE of the U.S.C.A. Ordered that the action is remanded to the District Court for further proceedings without costs in accordance with the opinion of this (USCA) Court; further ordered that the stay previously granted is extended on the condition specified in the opinion of this (USCA) Court. Fusaro, Clerk. (mailed notice).	
Jan. 18-74	Filed defts. ANSWER to complaint.	APB
Jan. 25-74	Filed plttfs. OSC for summary judgment--ORDERED that a hearing be held in Rm. 102 at 10am on Jan. 31, 1974 why an order should not be made granting plttfs. summary judgment and further ORDERED that personal service of a copy of this order and papers be served upon defts. on or before Jan. 25, 1974 by 4pm. Stewart, J.	
Jan. 25-74	Filed memorandum in support of plttfs. application for summary judgment.	
Jan. 24-74	Filed stip. and order that the complaint be supplemented and amended as indicated. So ordered, Stewart, J.	



47(consolidated with 73-1093 for all purposes)

STEWART, J.

Page -3-

DATE	PROCEEDINGS
Feb.4-74	Filed defts. memorandum of law in opposition to pltfs. motion for summary judgment.
Feb.4-74	Filed defts. affdt. of Evelyn J. Junge in opposition to motions for summary judgment.
Mar.8-74	Filed MEMORANDUM--Pltfs. motion for summary judgment is hereby denied. So ordered, Stewart, J. m/n
Mar.19-74	Filed pltfs. OSC--ORDERED that defts. show cause on March 25, 1974 in Rm.2602 at 4:30pm why the order of this court dated March 8 should not be amended in order to permit pltfs. to make an appropriate application to the USCA for the 2nd Circuit for leave to appeal from the Order dated March 8, 1974 and that personal service of a copy of this order be served upon defts. or their attys. by March 19, 1974 at 5pm. Stewart, J.
Apr.11-74	Filed defts. affdt. of Evelyn J. Junge in opposition to pltfs. motion to certification pursuant to 28 USC 1292(b).
Apr.15-74	Filed ORDER--ORDERED that the Opinion and order of March 8, 1974 be amended as indicated. So ordered, Stewart, J. m/n
May 30-74	Filed bond#J-8807536 for undertaking for costs on appeal in the amount of \$250.00 by the Fidelity and Deposit Co. of Maryland.



## CIVIL DOCKET

UNITED STATES DISTRICT COURT

JUDGE STEWART

197-72 CIV 1093 consolidated FOR ALL  
PURPOSES with this proceeding.  
D. C. Form No. 106 Rev. \_\_\_\_\_

D. C. Form No. 106 Rev.

TITLE OF CASE

ATTORNEYS

EXXON CORPORATION

Plaintiff

-against-

THE CITY OF NEW YORK,  
ENVIRONMENTAL PROTECTION ADMINISTRATION  
OF THE CITY OF NEW YORK; and  
ADMINISTRATOR OF THE ENVIRONMENTAL  
PROTECTION ADMINISTRATION OF THE CITY  
OF NEW YORK

## Defendants

For plaintiff:

Shearman & Sterling  
53 Wall St.,  
New York, N.Y. 10005

For defendant:

Adrian P. Burke, Corp. Counsel  
Municipal Bldg., NYC 10007

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.
J.S. 5 mailed x	Clerk	5/9/19	15	
J.S. 6 mailed <i>1/14/19</i>	Marshal	5/9/19	15	
Basis of Action: Declaratory Injunctive relief.	Docket fee			
	Witness fees			
Action arose at:	Depositions			

Exxon Corp., Vs. The City of N.Y., et al.

103 CIV 1047

DATE

PROCEEDINGS

Date Order  
Judgment No

Mar. 9-73 Filed complaint & issued summons.

Mar. 13-73 Filed plttf's affidavit & show cause order for preliminary injunction, ret. 3-15-73.

Mar. 13-73 Filed plttf's memorandum of law in support of his show cause order.

Mar. 14-73 Filed deft's memorandum in opposition to plttf's motion for preliminary injunction.

Mar. 13-73 Filed summons with affidavit of service by W. Fontana upon the City of New York on 3-9-73.

Mar. 23, 73 Filed Supplemental Memorandum of Law in opposition to Motion for Preliminary Injunction.

Mar. 23, 73 Filed Defts William Shapiro's Affidvt in support of Defts' Response.

Mar. 23, 73 Filed Suppl. Memorandum of Law in support of Plttf's Motion for preliminary injunction.

Mar. 23, 73 Filed Memorandum of Law in opposition to Motion for Preliminary Injunction.

Mar. 23, 73 Filed Raymond Carson's Suppl. Affidvt in support of Defts' Response.

Mar. 23, 73 Filed Memorandum in opposition to Plttf's Motion for Preliminary Injunction.

Mar. 23, 73 Filed Evan A. Davis's Affidvt in opposition to motion for preliminary injunction.

Mar. 23, 73 Filed Deft's Motion for leave to participate as Amici Curiae returnable 3/15/73, Room 318, 2:00 P.M.

Mar. 23, 73 Filed MEMORANDUM. I do not determine that no burden on interstate commerce would result if every state and locality were free to impose different fuel stds for emission of devices or for health purposes, as indicated, etc. For these reasons this motion by plttf for a preliminary injunction. So Ordered. Stewart, J. m/n

Mar. 26, 73 Filed Plttf's Injunction pending appeal. Ordered that plttf shall not be required to file a security bond as a condition of this injunction; ordered that this injunction pending appeal is granted on condition that plttf duly serve and file his motion; ordered that this injunction pending appeal may be served by a law clerk & filed by plttf's attys. Stewart, J. m/n

Mar. 27, 73 Filed Notice of Appeal (mailed copies)

Mar. 29, 73 Filed Deft City of NY Stip extending time to answer complaint returnable 20 days from date of position of appeal brought by Plttf in US Court of Appeals, etc. So Ordered.

Mar. 29, 73 Filed Defts Notice of Entry of true copy of Injunction pending appeal dated 3/20/73.

Mar. 31, 73 Filed trial transcript of record of proceedings dtd. Mar. 13/73 (consolidated w/ 73 c. 1)

Mar. 31, 73 Filed trial transcript of record of proceedings dtd. Mar. 15/73. (consolidated w/ 73 c. 1)

Mar. 31, 73 Filed trial transcript of record of proceedings dtd. Mar. 15/73. (consolidated w/ 73 c. 1)

Mar. 31, 73 Filed trial transcript of record of proceedings dtd. Mar. 15/73 (consolidated w/ 73 c. 1)

Mar. 13, 73 Filed Notice to Docket Clerk that record on appeal has been certified and transmitted to U.S. Court of Appeals on 4/13/73.

May 24-73 Filed true copy of Order of the U.S.C.A. Ordered that the action is remanded to the District Court for further proceedings without costs in accordance with the opinion of this Court; further ordered that the stay previously granted is extended on the condition specified in the opinion of this Court. Lusaro, Clerk. (mailed notice).

Jan. 14-74 Filed stip. and order that the complaint is supplemented and amended as indicated. So ordered, Stewart, J.

Jan. 18-74 Filed defts. ANSWER to complaint.

Jan. 24-74 Filed stip. and order that the complaint is supplemented and amended as indicated. So ordered, Stewart, J.

Jan. 25-74 Filed plttf. affdt. and notice of motion for an order granting summary judgment for plttf. with respect to Count 1 of the complaint ret. on: Feb. 4, 1974.

Jan. 25-74 Filed memorandum of law in support of plttf. Exxon Corp's. motion for summary judgment. (also in 73-1093).

Jan. 28-74 Filed stip. and order CONSOLIDATING 73 CIV 1047 and 73 CIV 1093 FOR ALL PURPOSES under 73 CIV. R. 17 -- Carter, J.

Mar. 26-73 Filed plttf's proposed findings of fact & conclusions of law.



STEWART, J.

Page -3-

consolidated with 73 CIV 1047 for  
purposes.

DATE	PROCEEDINGS
Jan. 25-74	Filed plffs. affdt. and notice of motion for an order granting summary judgment for pltf. with respect to Count 1 of the complaint. on: Feb. 4, 1974.
Jan. 25-74	Filed memorandum of law in support of pltf. Exxon Corp's. motion for summary judgment. (also see 73-1047).
Jan-28-74	Filed stip. and order consolidating 73 CIV 1023 with 73 CIV 1047 for all purposes under case # 73 CIV 1047 -- Stewart, J. (filed in 73 CIV 1047)

A. further entries

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

EXXON CORPORATION,	:	
	:	
Plaintiff,	:	73 Civ.
	:	
-against-	:	
	:	
THE CITY OF NEW YORK; ENVIRONMENTAL	:	
PROTECTION ADMINISTRATION OF THE CITY	:	<u>COMPLAINT</u>
OF NEW YORK; and ADMINISTRATOR OF	:	
THE ENVIRONMENTAL PROTECTION ADMINIS-	:	
TRATION OF THE CITY OF NEW YORK,	:	
	:	
Defendants.	:	

-----x

Plaintiff, for its complaint, avers:

1. Exxon Corporation, whose relevant business operations were conducted through its wholly-owned subsidiary, Humble Oil & Refining Company prior to January 1, 1973 is, and at all times relevant to this complaint was, a foreign corporation duly organized and existing under the laws of the State of New Jersey and qualified to do business in the State of New York.

2. Defendant The City of New York ("the City") is, and at all times relevant to this complaint was, a municipal corporation of the State of New York located in the Southern District of New York.

3. Defendant Environmental Protection Administration of the City of New York ("the City E.P.A.") is, and at all times relevant to this complaint was, an



administrative body appointed and acting pursuant to the Administrative Code of the City of New York, located in the Southern District of New York.

4. Upon information and belief, defendant Administrator of the Environmental Protection Administration ("the City Administrator"), or his predecessor in office, is, and at all times relevant to this complaint was, an individual appointed to supervise the City E.P.A. and acting in that capacity pursuant to the Administrative Code of the City of New York, located in the Southern District of New York.

#### COUNT I

5. This claim for declaratory and injunctive relief is brought under 28 U.S.C. §2201 against defendants under Article VI, Clause 2 (the Supremacy Clause) of the Constitution of the United States.

6. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars (\$10,000) and jurisdiction is conferred upon the Court by 28 U.S.C. §1331(a) (Federal Question). Venue is proper under 28 U.S.C. §1391(b).

7. On August 25, 1971, the City amended its Administrative Code by adding thereto, inter alia, §1403.2-13.11 "Lead content of gasoline restricted." That amendment, a copy of which is annexed hereto as Exhibit 1, required a restriction of the lead content of gasoline,

intended for use in the City, to a level of 1.0 grams per gallon ("g/gal.") by January 1, 1972, 0.5 g/gal. by January 1, 1973 and 0 g/gal. by January 1, 1974.

8. Plaintiff complied in good faith with the January 1, 1972 lead content restriction of 1.0 g/gal. and is now marketing gasoline intended for use in the City with a lead content of no more than 1.0 g/gal.

9. On November 6, 1972, plaintiff filed an application with the City E.P.A. for a variance from the January 1, 1973 lead content restriction of 0.5 g/gal. on the grounds of anticipated federal regulation of fuels and fuel additives, including lead, and the undue hardships which would be imposed on plaintiff by virtue of the 0.5 g/gal. restriction.

10. On February 16, 1973, the City Administrator denied plaintiff's application for a variance and granted plaintiff only until March 30, 1973 to meet the 0.5 g/gal. lead content restriction for gasoline with a research octane number below 95.9 ("regular") and until June 28, 1973 to meet the 0.5 g/gal. lead content restriction for gasoline with a research octane number of 95.9 and above ("premium").

11. On January 10, 1973, the Administrator of the Federal Environmental Protection Agency ("the Federal Administrator") promulgated a "Regulation of Fuels and Fuel Additives". That federal regulation, which is a control or prohibition of fuels and fuel additives, became



effective February 9, 1973, and a copy thereof is annexed hereto as Exhibit 2. It provides that sellers of gasoline such as plaintiff must make generally available throughout the nation at least one grade of gasoline with a lead content of not more than 0.05 g/gal. by July 1, 1974. Prior to that date, the regulation permits plaintiff and other such sellers of gasoline to continue to provide all grades of gasoline without restriction of the lead content thereof. Thus there is a federal control on a national basis of the lead content of gasoline.

12. The Federal Administrator possesses the authority under 42 U.S.C. 1857f-6c ("Regulation of fuels - Authority of Administrator to regulate") to prescribe a nation-wide prohibition or control of any fuel or fuel additive, including lead. Moreover, 42 U.S.C. §1857-6c provides further, in pertinent part:

"(4) (A) Except as otherwise provided in subparagraph (B) or (C), no State (or political subdivision thereof) may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any control or prohibition respecting use of a fuel or fuel additive in a motor vehicle or motor vehicle engine —

(i) if the Administrator has found that no control or prohibition under paragraph (1) is necessary and has published his finding in the Federal Register, or

(ii) if the Administrator has prescribed under paragraph (1) a control or prohibition applicable to such fuel or fuel additive, unless State prohibition or control is identical to the prohibition or control prescribed by the Administrator.

(B) Any State for which application of section 1857f-6a(a) of this title has at any time been waived under section 1857f-6a(b) of this title may at any time prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive.

(C) A State may prescribe and enforce, for purposes of motor vehicle emission control, a control or prohibition respecting the use of a fuel or fuel additive in a motor vehicle or motor vehicle engine if an applicable implementation plan for such State under section 1857c-5 of this title so provides. The Administrator may approve such provision in an implementation plan, or promulgate an implementation plan containing such a provision, only if he finds that the State control or prohibition is necessary to achieve the national primary or secondary ambient air quality standard which the plan implements."

13. The State of New York has never received a waiver as described in 42 U.S.C. §1857f-6c(c)(4)(B) nor has the State of New York filed an implementation plan, as described in 42 U.S.C. §1857f-6c(c)(4)(C), which has been approved by the Federal Administrator.

14. Section 1403.2-13.11 of Chapter 57 of the City's Administrative Code violates the Supremacy Clause (Article VI, Clause 2) of the Constitution of the United States in that Congress has specifically pre-empted the control or prohibition of any fuel or fuel additive and has barred the States and their political subdivisions from prescribing or attempting to enforce any control or prohibition respecting use of a fuel or fuel additive, unless the State prohibition or control, or that of its political subdivision, is identical to the prohibition or control prescribed by the Federal Administrator.



15. The City's lead content restriction of 0.5 g/gal. by January 1, 1973, extends to all grades of gasoline. That control takes effect March 30, 1973 as to grades of gasoline with a research octane number below 95.9 (regular) and June 28, 1973 as to grades of gasoline with a research octane number of 95.9 and above (premium). Its further control requires the lead content of all grades of gasoline to be 0 g/gal. by January 1, 1974. None of these restrictions is identical to any control or prohibition prescribed by the Federal Administrator.

16. As a direct and immediate result of the wrongful acts by defendants, plaintiff has sustained and will continue to sustain substantial losses. It is unable, without substantial expenditures, to enter into or honor contracts for the sale of regular or premium gasoline intended for use in the City after March 30, 1973 and June 28, 1973, respectively. Plaintiff cannot comply with the City's lead content restrictions without continuing great expense to itself. Furthermore, compliance with the City's scheduled reduction in lead content to 0 g/gal. could cause injury to plaintiff's customers.

17. By virtue of the wrongful acts of defendants and the resulting conflict between the federal regulation and the City's Administrative Code, plaintiff's final plans for the future production and sale of any gasoline intended for use in the City have been severely disrupted and delayed. Such disruption and delay are causing substantial losses which will continue to grow

in magnitude until defendants' conduct is enjoined.

18. The wrongful acts of defendants also have the effect of destroying plaintiff's existing business and good will and undermining future business and good will in the City. Such damages while growing ever larger are impossible to measure at this time.

19. For these reasons, plaintiff has no adequate remedy at law and unless defendants are preliminarily and permanently enjoined from enforcing the provisions of §1403.2-13.11 of Chapter 57 of the Administrative Code of the City, plaintiff will be irreparably damaged.

#### COUNT II

20. Plaintiff repeats and adopts by reference the averments of paragraphs 7 through 19, inclusive.

21. This claim for declaratory and injunctive relief is brought under 28 U.S.C. §2201 against defendants under Article I, Section 8, Clause 3 (the Commerce Clause) of the Constitution of the United States.

22. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars (\$10,000) and jurisdiction is conferred upon the Court by 28 U.S.C. 1331(a) (Federal Question) and 28 U.S.C. §1337 (Commerce). Venue is proper under 28 U.S.C. §1391(b).



23. Plaintiff is engaged in the production, transportation, distribution and sale of gasoline throughout the United States and numerous foreign countries. Plaintiff's gasoline intended for use in the City is blended and shipped from its Bayway Refinery located in the State of New Jersey.

24. Plaintiff's production, transportation, distribution and sale of gasoline products throughout the United States have been, and will increasingly continue to be, severely disrupted by §1403.2-13.11 of Chapter 57 of the City's Administrative Code.

25. Section 1403.2-13.11 of Chapter 57 of the City's Administrative Code imposes an impermissible burden on interstate commerce among the several states and as such violates the Commerce Clause of the Constitution of the United States.

WHEREFORE, plaintiff demands judgment:

(1) Preliminarily and permanently enjoining the defendants and each of them, their officers, agents, servants, employees and attorneys and those persons in active concert or participation with them from:

(a) enforcing or taking any steps to enforce the provisions of §1403.2-13.11(a)(3) and (4) of Chapter 57 of the Administrative Code of the City;

- (b) imposing any fine or penalty pursuant to §1403.2-15.25(d) of Chapter 57 of the Administrative Code of the City or any other provision of statutory, regulatory or common law, upon plaintiff for any non-compliance with §1403.2-13.11(a)(3) and (4) of Chapter 57 of the Administrative Code of the City; or
- (c) barring or attempting to bar the purchase, sale, offer for sale, storage or transportation of plaintiff's gasoline intended for use in the City by reason of any non-compliance with §1403.2-13.11(a)(3) and (4) of Chapter 57 of the Administrative Code of the City.

(2) Declaring that §1403.2-13.11(a)(3) and (4) of Chapter 57 of the City's Administrative Code are null and void by reason of the operation of the Commerce Clause of the Constitution of the United States in that defendants have imposed an impermissible burden on interstate commerce.

(3) Declaring that §1403.2-13.11(a)(3) and (4) of Chapter 57 of the City's Administrative Code are null and void by reason of the operation of the Supremacy Clause of the Constitution of the United States and the federal pre-emption of the control or prohibition of the lead content of gasoline.

(4) Awarding the plaintiff such other and further injunctive and other relief in the premises which may be consistent with justice, equity and good conscience.

SHEARMAN & STERLING

By                       
A Member of the Firm

Attorneys for Plaintiff  
Exxon Corporation  
53 Wall Street  
New York, New York 10005  
483-1000



§ 1403.2-13.11 Lead content of gasoline restricted.

(a) No person shall cause or permit the use, or, if intended for use in the City of New York, the purchase, sale, offer for sale, storage or transportation of gasoline which contains more than the following amount of lead by weight for the respective octane ranges as follows:

	95.9 Octane No. & Above	Below 95.9 Octane No.
(1) On and after November 1, 1971...	2.0 grams per gal.	1.5 grams per gal.
(2) On and after January 1, 1972....	1.0 grams per gal.	1.0 grams per gal.
(3) On and after January 1, 1973....	0.5 grams per gal.	0.5 grams per gal.
(4) On and after January 1, 1974....	zero grams	zero grams

(b) Where the lead content of gasoline is restricted to zero grams per gallon as in sub-section a, gasoline which contains 0.075 grams of lead per gallon shall be deemed to meet such restriction.

---

\* The term octane number shall mean research octane number or rating measured by the research method.

40 C.F.R. § 80

## Subpart A - General Provisions

## Sec. 80.1 Scope.

This part prescribes regulations for the control and/or prohibition of fuels and additives for use in motor vehicles and motor vehicle engines. These regulations are based upon a determination by the Administrator that the emission product of a fuel or additive will impair to a significant degree the performance of a motor vehicle emission control device in general use or which the Administrator finds has been developed to a point where in a reasonable time it would be in general use were such regulations promulgated; and certain other findings specified by the Act.

## Sec. 80.2 Definitions.

As used in this part:

(a) "Act" means the Clean Air Act, as amended (42 U.S.C. 1857 et seq.)

(b) "Administrator" means the Administrator of the Environmental Protection Agency.

(c) "Gasoline" means any fuel sold in any State\* for use in motor vehicles and motor vehicle engines, and commonly or commercially known or sold as gasoline.

(d) "Research octane number" means a measurement of a gasoline's knock characteristics which is determined by American Society for Testing and Materials analytical method designated D-2699.

(e) "Lead additive" means any substance containing lead or lead compounds.

(f) "Leaded gasoline" means gasoline which is produced with the use of any lead additive or which contains more than .05 grams of lead per gallon or more than .005 grams of phosphorus per gallon.

\*"State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam and American Samoa.



(g) "Unleaded gasoline" means gasoline containing not more than .05 grams of lead per gallon and not more than .005 grams of phosphorus per gallon.

(h) "Refinery" means a plant at which gasoline is produced.

(i) "Refiner" means any person who owns, leases, operates, controls, or supervises a refinery.

(j) "Retail outlet" means any establishment at which gasoline is sold or offered for sale to the public.

(k) "Retailer" means any person who owns, leases, operates, controls, or supervises a retail outlet.

(l) "Distributor" means any person who transports or stores or causes the transportation or storage of gasoline at any point between any gasoline refinery and any retail outlet.

#### Sec. 80.3 Test Methods.

The lead and phosphorus content of gasoline shall be determined in accordance with test methods to be prescribed by the Administrator.

#### Sec. 80.4 Right of entry; tests and inspections.

The Administrator or his authorized representatives upon presentation of appropriate credentials shall have a right to enter upon or through any retail outlet or the premises or property of any distributor and shall have the right to make inspections, take samples, and conduct tests to determine compliance with this part and the Act.

#### Sec. 80.5 Penalties.

Any person who violates these regulations shall forfeit and pay to the United States a civil penalty of \$10,000 for each and every day of the continuance of such violation, which shall accrue to the United States and be recovered in a civil suit in the name of the United States, brought in the district where such person has his principal office or any district in which he does business. The Administrator may, upon application by the



person against whom any such penalty has been assessed, remit or mitigate any such forfeiture. The Administrator shall have authority to determine the facts upon all such applications.

Sec. 80.20 (Reserved)

Sec. 80.21 Controls applicable to gasoline distributors.

After July 1, 1974, no distributor shall sell to any distributor or retailer any gasoline which he represents is unleaded gasoline unless such gasoline does, in fact, meet the defined requirements for unleaded gasoline in Section 80.2(g).

Sec. 80.22 Controls applicable to gasoline retailers.

(a) After July 1, 1974, no retailer or his employee or agent shall introduce, or cause or allow the introduction of leaded gasoline into any motor vehicle which is labeled "UNLEADED GASOLINE ONLY", or which is equipped with a gasoline tank filler inlet which is designed for the introduction of unleaded gasoline.

(b) After July 1, 1974, every person who owns, leases, operates, controls, or supervises a retail outlet at which 200,000 or more gallons of gasoline was sold during any calendar year beginning with the year 1971 shall offer for sale at least one grade of unleaded gasoline of not less than 91 Research Octane Number at such retail outlet; Provided, however, That the octane number of unleaded gasoline offered for sale in areas where altitude is greater than 2,000 feet may be reduced one (1) octane number for each succeeding 1000 feet but not more than three (3) octane numbers in total.

(c) After July 1, 1974, every person who owns, leases, operates, controls, or supervises six or more retail outlets shall offer for sale at least one grade of unleaded gasoline of not less than 91 Research Octane Number at no fewer than 60% of such outlets; Provided, however, That the octane number of unleaded gasoline offered for sale in areas where altitude is greater than 2,000 feet may be reduced one (1) octane number for each succeeding 1000 feet but not more than three (3) octane numbers in total.

(d) After July 1, 1974, every retailer shall prominently and conspicuously display in the immediate area of each gasoline pump stand the following notice:

Federal law prohibits the introduction of gasoline containing lead or phosphorus into any motor vehicle labeled "UNLEADED GASOLINE ONLY."

Such notice shall be no smaller than 36 point bold type and shall be located so as to be readily visible to the retailer's employees and customers.

(e) After July 1, 1974, every retailer shall affix to each gasoline pump stand a permanent legible label as follows:

(1) For gasoline pump stands containing pumps for introduction of unleaded gasoline into motor vehicles, the label shall state:

Unleaded gasoline.

(2) For gasoline pump stands containing pumps for introduction of leaded gasoline into motor vehicles, the label shall state:

Contains lead anti-knock compounds.

Any label required under this paragraph shall be located so as to be readily visible to the retailer's employees and customers.

(f) After July 1, 1974, every retailer shall equip all gasoline pumps as follows:

(1) Each pump from which leaded gasoline is sold shall be equipped with a nozzle spout having a terminal end with an outside diameter of not less than 0.930 inches (2.362 centimeters).

(2) Each pump from which unleaded gasoline is sold shall be equipped with a nozzle spout which meets the following specifications:

(i) the outside diameter of the terminal end shall not be greater than 0.840 inches (2.134 centimeters):

(ii) the terminal end shall have a straight section of at least 2.5 inches (6.34 centimeters) in length;

(iii) the retaining spring shall terminate 3.0 inches (7.6 centimeters) from the terminal end.

(g) If more than one grade of gasoline is dispensed from a gasoline pump or pump stand, the Administrator may grant an exception to paragraph (e) or (f) of this section where it has been demonstrated to his satisfaction that an alternate system of labeling or equipment will comply with the objectives of paragraph (e) or (f).

#### Sec. 80.23 Liability for violations

Liability for violations of paragraph (a) of Section 80.22 shall be determined as follows:

(a)(1) Where the corporate, trade, or brand name of a gasoline refiner or any of its marketing subsidiaries appears on the pump stand or is displayed at the retail outlet from which the gasoline was sold, the retailer and such gasoline refiner shall be deemed in violation. The refiner shall be deemed in violation irrespective of whether any refiner, distributor, or retailer, or the employee or agent of any refiner, distributor, or retailer may have caused or permitted the violation.

(2) Where the corporate, trade, or brand name of a gasoline refiner or any of its marketing subsidiaries does not appear on the pump or the pump stand or is not displayed at the retail outlet from which the gasoline was sold, the retailer and any distributor who sold the retailer gasoline contained in the retail outlet storage tank which supplied that pump at the time of the violation shall be deemed in violation.

(b)(1) In any case in which a retailer and any gasoline refiner or distributor would be in violation under sub-paragraph (1) or (2) or paragraph (a) the retailer shall not be liable if the retailer can demonstrate that the violation was not caused by him or his employee or agent.

(2) In any case under subparagraph (2) of paragraph (a) in which two or more distributors have



sold the retailer gasoline contained in the retail outlet storage tank which supplied the pump from which the gasoline was sold, any of such distributors who can demonstrate that the violation was not caused by him or his employee or agent shall not be liable.

(c) In any case in which the retailer or his employee or agent introduced leaded gasoline from a pump from which leaded gasoline is sold into a motor vehicle which is equipped with a gasoline tank filler inlet designed for the introduction of unleaded gasoline, only the retailer shall be deemed in violation.

Sec. 80.24 Controls applicable to motor vehicle manufacturers

The manufacturer of any motor vehicle equipped with an emission control device which the Administrator has determined will be significantly impaired by the use of leaded gasoline shall:

(a) Affix two permanent, legible labels reading "UNLEADED GASOLINE ONLY" to such vehicle at the time of its manufacture, as follows:

(1) One label shall be located on the instrument panel so as to be readily visible to the operator of the vehicle; Provided, however, That the required statement may be incorporated into the design of the instrument panel rather than provided on a separate label; and

(2) One label shall be located immediately adjacent to the gasoline filler tank inlet, outside of any filler inlet compartment, and shall be located so as to be readily visible to any person introducing gasoline to such filler inlet.

Such labels shall be in the English language in block letters which shall be of a color that contrasts with their background.

(b) Manufacture such vehicle with a gasoline tank filler inlet having a restriction with an inside diameter not greater than 0.910 inches (2.311 centimeters), which prevents the insertion of a nozzle with a spout larger than prescribed in § 80.22(g)(2)(i). Such filler inlet shall be designed so as to activate immediately any automatic shut-off device on any nozzle subject to § 80.22(g)(1) when the introduction of gasoline into such filler inlet from such a nozzle is attempted.

73 CIV.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

---

EXXON CORPORATION,

Plaintiff,

-against-

THE CITY OF NEW YORK; ENVIRON-  
MENTAL PROTECTION ADMINISTRATION  
OF THE CITY OF NEW YORK; AND  
ADMINISTRATOR OF THE ENVIRON-  
MENTAL PROTECTION ADMINISTRATION  
OF THE CITY OF NEW YORK,

Defendants.

---

COMPLAINT

---

Shearman & Sterling

Attorneys for Plaintiff  
53 Wall Street, New York 10005

453-1000

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
GETTY OIL CO. (Eastern Operations), :  
INC., GULF OIL CO. - U.S., MOBIL :  
OIL CORPORATION, and SUN OIL COM- :  
PANY OF PENNSYLVANIA, :

Plaintiffs, :

-against- :

THE CITY OF NEW YORK, HERBERT :  
ELISH, Environmental Protection :  
Administrator of the City of New :  
York, and THE ENVIRONMENTAL PRO- :  
TECTION ADMINISTRATION OF THE :  
CITY OF NEW YORK, :

Defendants. :  
-----x

COMPLAINT

OFFICE OF CORPORATION  
CITY OF NEW YORK  
JAN 14 1973

Plaintiffs Getty Oil Co. (Eastern Operations), Inc.,  
Gulf Oil Co. - U.S., Mobil Oil Corporation, and Sun Oil Com-  
pany of Pennsylvania, by their attorneys Shea Gould Climenko &  
Kramer, for their complaint, allege:

1. Getty Oil Co. (Eastern Operations), Inc. ("Getty")  
is, and at all times relevant to this complaint was, a cor-  
poration, duly organized and existing under and by virtue of  
the laws of the State of Delaware, qualified to do business  
in the State of New York and engaged in the refining, distribu-  
tion, transportation, storage and sale of gasoline for use in  
the operation of motor vehicles. Getty's business is conducted  
in interstate commerce in and among the several states, includ-  
ing, but not limited to, the State and City of New York.

2. Gulf Oil Co. - U.S. ("Gulf") is, and at all times  
relevant to this complaint was, a corporation, duly organized  
and existing under and by virtue of the laws of the State of  
Pennsylvania, qualified to do business in the State of New York



and engaged in the refining, distribution, transportation, storage and sale of gasoline for use in the operation of motor vehicles. Gulf's business is conducted in interstate commerce in and among the several states, including, but not limited to, the State and City of New York.

3. Mobil Oil Corporation ("Mobil") is, and at all times relevant to this complaint was, a corporation, duly organized and existing under and by virtue of the laws of the State of New York and engaged in the refining, distribution, transportation, storage and sale of gasoline for use in the operation of motor vehicles. Mobil's business is conducted in interstate commerce in and among the several states, including, but not limited to, the State and City of New York.

4. Sun Oil Company of Pennsylvania ("Sun") is, and at all times relevant to this complaint was, a corporation, duly organized and existing under and by virtue of the laws of the State of Pennsylvania and engaged in the refining, distribution, transportation, storage and sale of gasoline for use in the operation of motor vehicles. Sun's business is conducted in interstate commerce in and among the several states, including, but not limited to, the State and City of New York.

5. Defendant City of New York is, and at all times relevant to this complaint was, a municipal corporation, existing by virtue of a Charter granted by the State of New York, political subdivisions of which are located in the Southern District of New York.

6. Upon information and belief, on or about February 16, 1973, defendant Herbert Elish ("Elish") was duly appointed to succeed Jerome Kretchmer as Administrator of The Environmental Protection Administration of the City of New York, and

since the time of his appointment has acted in that capacity pursuant to the Administrative Code of the City of New York.

7. Defendant The Environmental Protection Administration of the City of New York (the "City E.P.A.") is, and at all times relevant to this complaint was, an administrative body, acting pursuant to the Administrative Code of the City of New York, and having its principal office in the Southern District of New York.

#### COUNT ONE

8. This claim for declaratory and injunctive relief is brought pursuant to the Supremacy Clause (Article VI, Clause 2) of the Constitution of the United States and 28 U.S.C. §2201.

9. The matter in controversy exceeds, exclusive of interests and costs, the sum of Ten Thousand Dollars (\$10,000). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1331(a) (Federal Question). Venue is proper pursuant to 28 U.S.C. §1391(b).

10. (a) On or about December 31, 1970, Congress amended the Clean Air Act (42 U.S.C. §1857 et seq.) by adopting the Clean Air Amendments of 1970 (Public Law 91-604; 84 Stat. 1676). The said Clean Air Amendments provide, inter alia, for the regulation of the lead content of motor vehicle fuels for the purpose of controlling the emissions thereof.

(b) Section 211 of the Clean Air Act, as amended (42 U.S.C. §1857f-6c), provides, in pertinent part:

"(c)(1) The Administrator may, from time to time on the basis of information obtained under subsection (b) of this section or other information available to him, by regulation,



control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle or motor vehicle engine (A) if any emission products of such fuel or fuel additive will endanger the public health or welfare, or (B) if emission products of such fuel or fuel additive will impair to a significant degree the performance of any emission control device or system which is in general use, or which the Administrator finds has been developed to a point where in a reasonable time it would be in general use were such regulation to be promulgated."

11. (a) Acting pursuant to Section 211 of the Clean Air Act (42 U.S.C. §1847f-6c), on or about January 10, 1973, the Federal Environmental Protection Agency, by its Administrator William D. Ruckelshaus, promulgated certain "Controls and Prohibitions" with respect to gasoline applicable to gasoline refiners, distributors and retailers (Part 80, Chapter I, Title 40, Code of Federal Regulations).

(b) The aforesaid regulations, as promulgated, provide, inter alia:

"§80.2 Definitions.

As used in this part:

\* \* \*

(e) 'Lead additive' means any substance containing lead or lead compounds.

(f) 'Leaded gasoline' means gasoline which is produced with the use of any lead additive or which contains more than 0.05 gram of lead per gallon or more than 0.005 gram of phosphorus per gallon.

(g) 'Unleaded gasoline' means gasoline containing not more than 0.05 gram of lead per gallon and not more than 0.005 gram of phosphorus per gallon.

\* \* \*

"§80.22 Controls applicable to gasoline retailers.

\* \* \*

(b) After July 1, 1974, every person who

owns, leases, operates, controls, or supervises a retail outlet at which 200,000 or more gallons of gasoline was sold during any calendar year beginning with the year 1971 shall offer for sale at least one grade of unleaded gasoline of not less than 91 Research Octane Number at such retail outlet: Provided, however, that the octane number of unleaded gasoline offered for sale in areas where altitude is greater than 2,000 feet may be reduced one (1) octane number for each succeeding 1,000 feet but not more than three (3) octane numbers in total.

(c) After July 1, 1974, every person who owns, leases, operates, controls, or supervises six or more retail outlets shall offer for sale at least one grade of unleaded gasoline of not less than 91 Research Octane Number at no fewer than 60 percent of such outlets: Provided, however, that the octane number of unleaded gasoline offered for sale in areas where altitude is greater than 2,000 feet may be reduced one (1) octane number for each succeeding 1,000 feet but not more than three (3) octane numbers in total."

12. (a) The aforesaid Federal regulations, as promulgated, were published in the Federal Register, Vol. 38, No. 6 on January 10, 1973.

(b) Section 311 of the Clean Air Act (42 U.S.C. §1857h-5) provides, in pertinent part:

"(b)(1) A petition for review of action of the Administrator in promulgating . . . any control or prohibition under section 1857f-6c . . . may be filed only in the United States Court of Appeals for the District of Columbia . . . Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day."

(c) As of the date of the filing of this complaint, defendant City of New York has not filed any such petition for review of the aforesaid regulations as promulgated by the Administrator of the Federal Environmental Protection Agency, and the time within which to have done so has elapsed.

13. Section 211 of the Clean Air Act (42 U.S.C. §1857f-6c) also provides, in pertinent part:



"(4) (A) Except as otherwise provided in subparagraph (B) or (C), no State (or political subdivision thereof) may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any control or prohibition respecting use of a fuel or fuel additive in a motor vehicle or motor vehicle engine —

(i) if the Administrator has found that no control or prohibition under paragraph (1) is necessary and has published his finding in the Federal Register, or

(ii) if the Administrator has prescribed under paragraph (1) a control or prohibition applicable to such fuel or fuel additive, unless State prohibition or control is identical to the prohibition or control prescribed by the Administrator.

(B) Any State for which application of section 1857f-6a(a) of this title has at any time been waived under section 1857f-6a(b) of this title may at any time prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive.

(C) A State may prescribe and enforce, for purposes of motor vehicle emission control, a control or prohibition respecting the use of a fuel or fuel additive in a motor vehicle or motor vehicle engine if an applicable implementation plan for such State under section 1857c-5 of this title so provides. The Administrator may approve such provision in an implementation plan, or promulgate an implementation plan containing such a provision, only if he finds that the State control or prohibition is necessary to achieve the national primary or secondary ambient air quality standard which the plan implements."

14. The State of New York has never received a waiver as described in 42 U.S.C. §1857f-6c(c)(4)(B) nor has the State of New York filed an implementation plan, as described in 42 U.S.C. §1857f-6c(c)(4)(C), which has been approved by the Federal Administrator.

15. Thus, by prescribing the aforesaid regulations and controls with respect to gasoline, the Administrator of the Federal Environmental Protection Agency has preempted any regu-



latory action by any state, or political subdivision thereof, with respect to gasoline unless such regulation is identical to the prohibition or control prescribed by him.

16. (a) Notwithstanding the aforesaid provisions of the Clean Air Act, as amended, in or about July 1971, defendant City of New York adopted Local Law No. 49, amending its Administrative Code by adding thereto a new chapter entitled "Chapter 57 Environmental Protection Administration Part II-- Air Pollution Control Code" (hereinafter referred to as "Local Law No. 49").

(b) Local Law No. 49 contains, inter alia, provisions which purport to regulate the sale and use of gasoline for motor vehicles in the City of New York and to prohibit the sale or use, regardless of where purchased, of gasoline in the City of New York unless said gasoline meets certain specifications with respect to lead content and other physical characteristics thereof, which specifications are set by the City of New York and are not identical with the regulations promulgated by the Administrator of the Federal Environmental Protection Agency, as required by Section 211(c)(4)(A) of the Clean Air Act, as amended (42 U.S.C. §1857f-6c).

17. Article 13, Section 1403.2-13.11 of Local Law No. 49 provides, in pertinent part:

"§1403.2-13.11 Lead content of gasoline restricted.

(a) No person shall cause or permit the use, or, if intended for use in the City of New York, the purchase, sale, offer for sale, storage or transportation of gasoline which contains more than the following amount of lead by weight for the respective octane ranges as follows:

	<u>95.9 Octane No.* and Above</u>	<u>Below 95.9 Octane No.*</u>
(1) on and after November 1, 1971	2.0 grams per gal.	1.5 grams per gal.
(2) on and after January 1, 1972	1.0 grams per gal.	1.0 grams per gal.
(3) on and after January 1, 1973	0.5 grams per gal.	0.5 grams per gal.
(4) on and after January 1, 1974	zero grams	zero grams

\*The term octane number shall mean research octane number or rating measured by the research method.

(b) Where the lead content of gasoline is restricted to zero grams per gallon as in subsection a, gasoline which contains 0.075 grams of lead per gallon shall be deemed to meet such restriction."

18. (a) Article 13, §1403.2-13.12 of Local Law No. 49 also provides:

"Effective October 1, 1971, no person shall cause or permit the use, or, if intended for use in the city of New York, the purchase, sale, offer for sale, storage or transportation of gasoline which exceeds the following volatility limits:

(a) For the period October 1, through April 30, not to exceed 12 Reid vapor pressure.

(b) For the period May 1, through September 30, not to exceed 7 Reid vapor pressure."

(b) The aforesaid gasoline regulations promulgated by the Administrator of the Federal Environmental Protection Agency contain no provisions whatsoever as to volatility limits.

19. Local Law No. 49 contains other related provisions for administrative enforcement and for civil and criminal penalties which may be triggered by failure to comply with the provisions set forth therein.

20. (a) Local Law No. 49 was adopted by defendant City



of New York in haste and with full knowledge of the prior enactment by Congress of the Clean Air Act, as amended.

(b) With knowledge that the aforesaid Federal regulations with respect to gasoline became effective as of February 9, 1973, defendant City E.P.A., in a decision dated February 16, 1973, by Jerome Kretchmer, its then Administrator, declared that plaintiffs and other marketers of gasoline will be required to comply with the applicable provisions of §1403.2-13.11 as follows:

(i) by March 30, 1973, preparations must be completed for the supplying of conforming regular grade of gasoline, i.e., gasoline with an Octane No. below 95.9;

(ii) by June 28, 1973, preparations must be completed for the supplying of conforming premium grade gasoline, i.e., gasoline with an Octane No. of at least 95.9.

(c) Thus, plaintiffs have already become and will continue to be subjected to the substantive, administrative, civil and criminal provisions of Local Law No. 49, unless the declaratory and injunctive relief sought herein is granted by this Court.

21. By reason of all of the matters hereinabove alleged, the enactment and enforcement of Local Law No. 49 constitutes an unlawful attempt at the exercise of legislative power by defendant City of New York in contravention of the Clean Air Act, as amended, and in violation of the Supremacy Clause (Article VI, Clause 2) of the Constitution of the United States.

22. Plaintiffs have no adequate remedy at law.



COUNT TWO

23. Plaintiffs repeat and reallege paragraphs "8" through "22" hereinabove set forth as though the same were fully set forth herein.

24. This claim for declaratory and injunctive relief is brought pursuant to 28 U.S.C. §2201 and the Commerce Clause (Article I, Section 8, Clause 3) of the Constitution of the United States.

25. The matter in controversy exceeds, exclusive of interests and costs, the sum of Ten Thousand Dollars (\$10,000). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1331(a) (Federal Question) and 28 U.S.C. §1337 (Commerce). Venue is proper pursuant to 28 U.S.C. §1391(b).

26. The transportation, sale, wholesale and retail distribution (as conducted by plaintiffs and by the petroleum industry) and the purchase, consumption and use of gasoline by the public are activities which may be conducted in interstate commerce:

(a) Crude oil is produced in several states outside of the City and State of New York and in foreign countries.

(b) Crude oil is refined at facilities located outside the City and State of New York to make gasoline and other petroleum products, part of which is ultimately sold or used in the City and State of New York.

(c) Gasoline and other petroleum products are transported by pipeline and over water from outside the City and State of New York to locations both in or near the City

of New York for storage pending wholesale and retail distribution in the metropolitan area.

(d) Gasoline is stored for wholesale and retail distribution in tanks outside the City and State of New York, part of the contents of which is shipped into the City limits of the City of New York for sale therein.

(e) Gasoline is stored within the City limits of the City of New York in tanks for wholesale and retail distribution, part of which distribution is outside the City of New York and State of New York.

(f) Gasoline is sold at retail inside and outside the City and State of New York to operators of motor vehicles for use indiscriminately inside and outside of the limits of the City of New York or the State of New York.

(g) New York City is located between New Jersey, Connecticut, Westchester and Long Island and is connected thereto by numerous bridges, tunnels, highways and streets. On all of the roads of ingress and egress to the City of New York there are hundreds of points of retail distribution of gasoline, both within and without the city and state boundary lines.

(h) Operators of motor vehicles fill the gasoline tanks of said vehicles with gasoline inside or outside the City of New York with no preconceived limitation in its intended use and drive freely in or out of the City and State of New York without regard to whether the gasoline in the tank is authorized for use in the City of New York. Clearly, plaintiffs can have no knowledge of where such gasoline will be used.



27. Thus, the economic pattern of refining, storage, distribution, sale and use of gasoline in the United States has been based upon the public necessity to have gasoline move freely in interstate commerce unsubjected to local legislative restrictions which inhibit or prevent the free movement thereof.

28. (a) It is impossible for plaintiffs to comply with the express provisions of Local Law No. 49 without asking each and every customer where he intends to use the gasoline he is about to purchase.

(b) In order to otherwise comply with the provisions of Local Law No. 49 and thereby avoid the civil and criminal penalties thereunder provided, it will be necessary for plaintiffs to reconstruct, rearrange and reorganize their interstate activities in respect of the refining, storage and distribution of gasoline for motor vehicle use. This will involve (i) changing refining procedures and facilities; (ii) redesigning, rearranging and relocating transportation and storage facilities; and (iii) restructuring interstate distribution patterns and sales procedures at the wholesale and retail level.

(c) All of the foregoing will require extensive modifications in plaintiffs' refining, storage and distribution systems, which will materially increase plaintiffs' cost structure.

29. Thus, compliance with the provisions of Local Law No. 49 will require plaintiffs to undertake costly and extensive modifications in their refining operations in order to produce and to transport special gasolines for use in New York



City in addition to the other grades of gasoline which they currently refine and ship to New York City for sale in surrounding areas.

30. Such costly and extensive modifications would not be required in order to comply with the Federal regulations promulgated by the Administrator of the Federal Environmental Protection Agency and which became effective as of February 9, 1973.

31. In the event plaintiffs fail to comply with Local Law No. 49, plaintiffs would be subject to civil and criminal penalties. Moreover, if plaintiffs fail to comply, defendants could commence an action or proceeding to compel compliance, or to enjoin the sale by plaintiffs of gasoline within the City of New York. Such an injunction would stop the sale of approximately 1,387,250 gallons of gasoline per day and could result in the closing of approximately 1,200 service stations selling plaintiffs' products.

32. The central purpose of the gasoline restrictions contained in Local Law No. 49 is impossible of achievement since no strictly local regulation can effectively control use of gasoline within a particular geographic area within the United States, inasmuch as knowledge of where gasoline is to be used is reposed with the purchaser, and at the time of its purchase even he may not know where such gasoline will eventually be used. Clearly, such controls are impossible except when enforced nationwide by Federal authority.

33. By reason of all of the matters hereinabove alleged, the enactment and enforcement of Local Law No. 49 constitutes an unlawful and impermissible burden upon the inter-

state commerce of the United States in violation of Article I, Section 8, Clause 3 of the Constitution of the United States and in contravention of the Clean Air Act, as amended, and will cause grievous injury to plaintiffs unless enjoined.

WHEREFORE, plaintiffs demand judgment:

(1) Preliminarily and permanently enjoining Defendants, their officers, agents, servants, employees, attorneys and persons acting under their authority from:

(a) enforcing or taking any steps to enforce the provisions of Section 1403.2-13.11 or Section 1403.2-13.12 of Local Law No. 49;

(b) imposing any fine or penalty, pursuant to Section 1403.2-15.25 of Local Law No. 49, or any other provision of statutory, regulatory or common law, upon plaintiffs for any noncompliance with Section 1403.2-13.11 or Section 1403.2-13.12 of Local Law No. 49;

(c) enjoining or attempting to enjoin, pursuant to Section 1403.2-15.21 of Local Law No. 49, the purchase, sale, offer for sale, storage or transportation of plaintiffs' gasoline intended for use within the City of New York by reason of any noncompliance with Section 1403.2-13.11 or Section 1403.2-13.12 of Local Law No. 49.

(2) Declaring Section 1403.2-13.11 and Section 1403.2-13.12 of Local Law No. 49 null and void under the Supremacy Clause of the Constitution of the United States and the Clean Air Act, as amended.



(3) Declaring the provisions of Local Law No. 49 regulating the purchase, sale, offer for sale, storage or transportation of gasoline null and void under the Supremacy Clause of the Constitution of the United States and the Clean Air Act, as amended.

(4) Declaring the provisions of Local Law No. 49 regulating the purchase, sale, offer for sale, storage or transportation of gasoline null and void under the Commerce Clause of the Constitution of the United States by reason of the fact that Local Law No. 49 imposes an impermissible burden on interstate commerce.

(5) Granting plaintiffs such other and further relief as to the Court seems just and proper.

SHEA GOULD CLIMENKO & KRAMER

By *Thomas J. Kramer*  
A Member of the Firm

Attorneys for Plaintiffs  
Getty Oil Co. (Eastern Operations), Inc.  
Mobil Oil Corporation  
Sun Oil Company of Pennsylvania  
330 Madison Avenue  
New York, New York 10017  
(212) 661-3200

ARTHUR L. VANGELI, ESQ.  
Attorney for Gulf Oil Co.-U.S.  
1290 Avenue of the Americas  
New York, New York  
(212) 582-3300

By SHEA GOULD CLIMENKO & KRAMER  
OF COUNSEL  
*Thomas J. Kramer*  
A Member of the Firm

(All papers to be served on  
Shea Gould Climenko & Kramer  
at 330 Madison Avenue  
New York, New York 10017)



INDEX NO.

## UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

GULF OIL CO. (DEBTOR OPERATIONS), INC., GULF OIL CO. - U.S. NO. 1, OIL CORPORATION AND GULF OIL COMPANY OF PENNSYLVANIA,

Plaintiffs,

- against -

THE CITY OF NEW YORK, HERBERT ELISH, Environmental Protection Administrator of the City of New York, and THE ENVIRONMENTAL PROTECTION ADMINISTRATION OF THE CITY OF NEW YORK,

Defendants.

## SUMMONS AND COMPLAINT

SHEA GOULD CLIMENKO &amp; KRAMER

330 MADISON AVENUE

NEW YORK, N. Y. 10017

NO 1-3200

ATTORNEYS FOR Plaintiffs

*Copies Received*  
*Herbert Elish and*  
*Environmental Protection Administration*  
*By - Frank H. Hays, General Counsel*  
*March 14, 1973 4:50 p.m.*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
EXXON CORPORATION,

Plaintiff,

-against-

THE CITY OF NEW YORK; ENVIRONMENTAL  
PROTECTION ADMINISTRATION OF THE  
CITY OF NEW YORK; and ADMINISTRATOR  
OF THE ENVIRONMENTAL PROTECTION  
ADMINISTRATION OF THE CITY OF  
NEW YORK,

Defendants.

:

:

:

:

:

:

:

:

-----x

73 Civ.

AFFIDAVIT IN  
SUPPORT OF  
PLAINTIFF'S  
APPLICATION FOR  
AN ORDER TO SHOW  
CAUSE AND MOTION  
FOR A PRELIMINARY  
INJUNCTION

STATE OF NEW YORK )

COUNTY OF NEW YORK )

Raymond J. Campion, being duly sworn, deposes  
and says:

1. I am a Research Associate employed by Esso  
Research and Engineering Company, a wholly-owned sub-  
sidiary of plaintiff Exxon Corporation. I hold a Ph.D.  
in physical chemistry and am primarily responsible for  
research on the effect of fuel composition on automotive  
emissions.

2. This affidavit is respectfully submitted in  
support of a motion for a preliminary injunction against  
defendants' attempt to enforce the provisions of  
§1403.2-13.11(a)(3) and (4) of Chapter 57 of the Adminis-  
trative Code of the City of New York.

3. On February 16, 1973, I was notified that the Administrator of the New York City Environmental Protection Administration ("City Administrator") had denied plaintiff's application for a variance from the provisions of §1403.2-13.11 of Chapter 57 of the Administrative Code which require plaintiff to reduce the lead content by weight of its gasoline intended for use in New York City to 0.5 grams per gallon ("g/gal.") in 1973 and to 0 g/gal. by January 1, 1974. I was further notified that plaintiff is required to achieve the reduction to 0.5 g/gal. by March 30, 1973 with respect to its regular gasoline (i.e., gasoline with an octane rating below 95.9) and by June 28, 1973 with respect to its premium gasoline (i.e., gasoline with an octane rating of 95.9 and above). In 1972, plaintiff's total gasoline sales in the City of New York amounted to 129,800,000 gallons, almost half of which was regular grade gasoline. Thus, plaintiff is required to reduce the lead content of a substantial amount of its gasoline sold in New York City to 0.5 g/gal. by March 30, 1973.

4. The additional reduction in the lead content of gasoline intended for use in New York City would not significantly reduce the City's level of airborne lead salts nor would it significantly reduce the City's overall level of airborne particulates. This conclusion is supported by an analysis of Citywide Atmospheric Concentration statistics collected by the City's Department of Air Resources. These statistics which were released by the Commissioner of the City's Department of Air Resources in the form of a bar chart, are attached hereto as Exhibit 1.



5. The Department of Air Resources lead concentration statistics indicate that ambient lead salts were at a Citywide level of 2.4 micrograms per cubic meter (" $\text{ug}/\text{m}^3$ ") in 1971. (The figures given on Exhibit 1 are for lead alone and must be multiplied by a factor of 1.5 in order to arrive at the concentration level of ambient lead salts, the commonly utilized form for measuring lead concentrations.) At that time the lead content of gasoline sold in New York City was approximately 3 g/gal. In 1972 when the lead content of gasoline sold in New York City was restricted to 1 g/gal., the Citywide level of ambient lead salts was reduced to  $1.4 \text{ ug}/\text{m}^3$ . A linear extrapolation based on the above information demonstrates that reduction of the lead content of gasoline sold in the City to 0.5 g/gal. would yield a Citywide level of ambient lead salts of  $1.2 \text{ ug}/\text{m}^3$ . A further reduction of the lead content of gasoline sold in the City to 0 g/gal. would yield a Citywide level of ambient lead salts of  $1.0 \text{ ug}/\text{m}^3$ . Complete ambient lead salt elimination cannot be obtained by reducing the lead content of gasoline sold in New York City because of the significant number of motor vehicles driven in the City that are fueled outside the City, lead salt particulates that enter the City from outside due to air movement and lead salt particulates from sources in the City other than motor vehicles. The charts annexed hereto as Exhibits 2 and 3, which were prepared under my direction and supervision, illustrate the relevant Citywide lead concentration statistics.

6. A further analysis of the Department of Air Resources statistics also indicates that Citywide ambient

lead salts represented 5.9% of the City's controllable airborne particulates in 1971 when the lead content of gasoline was approximately 3 g/gal. In 1972 when the lead content of gasoline sold in the City was restricted to 1 g/gal., Citywide ambient lead salts were reduced to 3.6% of the City's controllable airborne particulates. A linear extrapolation of the above information demonstrates that at a 0.5 g/gal. lead content for gasoline sold in the City, ambient lead salts would represent 3% of the City's controllable airborne particulates. At a 0 g/gal. lead content for gasoline sold in the City, ambient lead salts would represent 2.4% of the City's controllable particulate. A chart annexed hereto as Exhibit 4, which was prepared under my direction and supervision, illustrates the contribution of lead salts to controllable airborne particulates.

7. Briefly summarized, a reduction in the lead content of gasoline sold in the City from the present level of 1 g/gal. to 0.5 g/gal. would only result in an insignificant reduction in ambient lead salts in the City of  $0.2 \text{ ug/m}^3$  which represents a decrease from  $1.4 \text{ ug/m}^3$  to  $1.2 \text{ ug/m}^3$ . Moreover, the City's overall particulate level would only be reduced by the same  $0.2 \text{ ug/m}^3$ , an even more insignificant reduction in that context. A reduction in the lead content of gasoline from the present level of 1 g/gal. to 0 g/gal. would only reduce the City's ambient lead salts by  $0.4 \text{ ug/m}^3$  and its overall ambient particulate matter by the same insignificant amount.



8. In addition to the lack of any significant reduction in either the City's ambient lead salts or its controllable airborne particulates, the City's requirement of the elimination of lead from all gasoline sold in the City after January 1, 1974 would have a deleterious impact on consumers of gasoline in the City and would ultimately retard the rate of air quality improvement. Lead additives in gasoline act both as an aid to the achievement of the octane rating required for efficient performance of today's motor vehicles and as a lubricant for certain parts of motor vehicle engines. Removal of all lead additives by January 1, 1974, as required by the City's lead restrictions, would adversely affect the performance characteristics of today's motor vehicles in that excessive valve seat wear would occur in vehicles not designed to run on lead-free fuel. This excessive wear would occur due to the absence of lead as a lubricant in the continuous operation of the engine valves. When the valve seats wear out prematurely, more exhaust gases would escape from the engine. Since motor vehicles in use today, with few exceptions, are not designed to run on lead-free gasoline and are not equipped with special induction-hardened exhaust valve seats to overcome the absence of lead's lubricating function, measurable increases in non-lead mass exhaust emissions would result, thus slowing the rate of air quality improvement in the City.

9. The current federal control of lead as a fuel additive does not result in the same adverse effects as the City's premature reduction and elimination



of lead in gasoline since the federal regulation permits continued unrestricted use of leaded gasoline until July 1, 1974, at which time at least one grade of lead-free gasoline must be generally available throughout the country. The federal schedule is timed to coincide with the production of vehicles designed to run on lead-free gasoline and equipped both with induction-hardened exhaust valve seats and catalytic converter exhaust emission control devices. Such vehicles are not in use now, nor will they be in use on January 1, 1974 when the City requires all gasolines sold within its confines to be lead-free.

10. The City's gasoline lead content restrictions of 0.5 g/gal. and 0 g/gal. respectively will not significantly reduce ambient lead salt levels or controllable airborne particulates. These restrictions will, however, adversely effect the engine performance of today's motor vehicles and cause a measurable increase in non-lead mass exhaust emissions and thus retard the rate of air quality improvement.

---

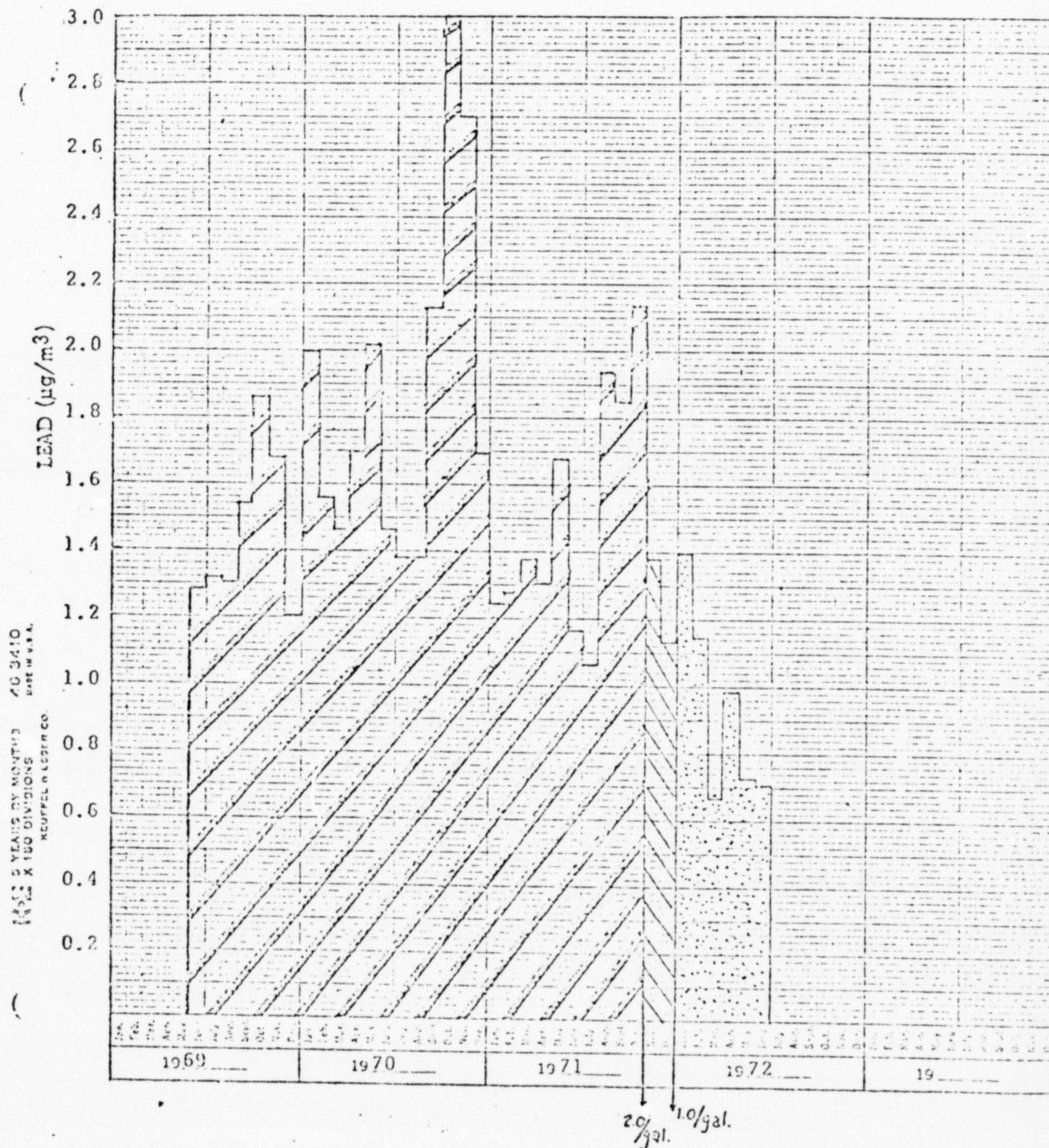
Raymond J. Campion

Sworn to before me  
this       day of  
March, 1973

---

Notary Public

LEAD  
( $\mu\text{g}/\text{m}^3$ )  
CITYWIDE ATMOSPHERIC CONCENTRATIONS



(SOURCE: COMMISSIONER HART'S TESTIMONY DATED OCTOBER 25, 1972.)



NEW YORK CITY ATMOSPHERIC LEAD SALT DATA

A. STREET LEVEL LEAD IN HIGH TRAFFIC AREAS

<u>YEAR</u>	<u>Pb, G/GAL.</u>	<u>AMBIENT LEAD SALTS, <math>\mu\text{g}/\text{m}^3</math></u>	<u>% OF CONTROLLABLE PARTICULATE (a)</u>
1971	~3	7.8 - 12.4	20 - 30
1972	1.0	4.7 - 9.3	12 - 23
1973	0.5	4.1 - 8.2	10 - 20
1974	0.0	3.5 - 7.0	9 - 18

B. CITYWIDE LEAD CONCENTRATIONS

<u>YEAR</u>	<u>Pb, G/GAL.</u>	<u>AMBIENT LEAD SALTS, <math>\mu\text{g}/\text{m}^3</math></u>	<u>% OF CONTROLLABLE PARTICULATE (a)</u>
1971	~3	2.4	5.9
1972	1.0	1.4	3.6
1973	0.5	1.2	3.0
1974	0.0	1.0	2.4

(a) Based on assumption that only  $40 \mu\text{g}/\text{m}^3$  of Federal particulate standard is controllable in NYC.



49a

36th STREET DATA

$\mu\text{g Pb}/\text{m}^3$

3.0



6.0

Pre-Control  
(~3 g/gal.)

1972  
(1.0 g/gal.)

1973  
(0.5 g/gal.)

1974  
(0.0 g/gal.)

 - 36th Street  
 - Citywide

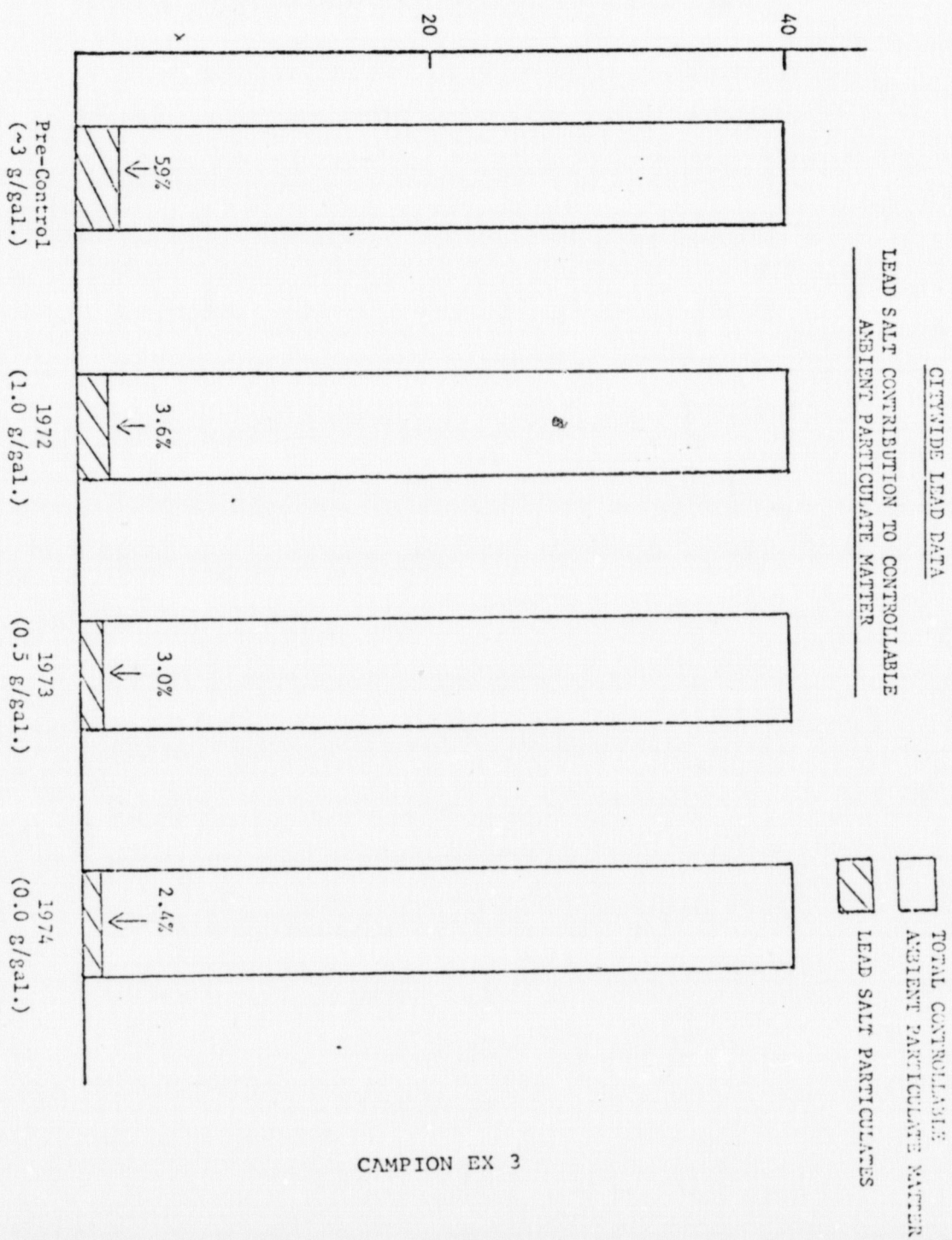
36th Street and Citywide Atmospheric Lead Data

CITYWIDE DATA

$\mu\text{g Pb}/\text{m}^3$

0.75

1.5

$\mu\text{g}/\text{m}^3$ , SUSPENDED PARTICULATE

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

EXXON CORPORATION,	:	73 Civ.
Plaintiff,	:	
-against-	:	AFFIDAVIT IN
	:	SUPPORT OF
	:	PLAINTIFF'S
THE CITY OF NEW YORK; ENVIRONMENTAL	:	APPLICATION FOR
PROTECTION ADMINISTRATION OF THE CITY	:	AN ORDER TO SHOW
OF NEW YORK; and ADMINISTRATOR OF THE	:	CAUSE AND MOTION
ENVIRONMENTAL PROTECTION ADMINISTRATION	:	FOR A PRELIMI-
OF THE CITY OF NEW YORK,	:	<u>NARY INJUNCTION</u>
Defendants.	:	

-----x

STATE OF NEW YORK     )  
                              :  
COUNTY OF NEW YORK    )

Robert L. Clare, Jr., being duly sworn, deposes  
and says:

1. I am a member of the firm of Shearman & Sterling, attorneys for plaintiff Exxon Corporation and I submit this affidavit in support of plaintiff's application for an order to show cause bringing on a motion pursuant to Rule 65 of the Federal Rules of Civil Procedure for a preliminary injunction against defendants' attempt to enforce the provisions of §1403.2-13.11(a)(3) and (4) of Chapter 57 of the Administrative Code of the City of New York.

2. Plaintiff is currently required by a fuel and fuel additive regulation issued by the Administrator of the Federal Environmental Protection Agency ("Federal



Administrator") to reduce the lead content of at least one grade of its gasoline to a level of not more than 0.05 grams per gallon ("g/gal.") by July 1, 1974. In establishing this lead content control on a nation-wide basis, the Federal Administrator acted pursuant to his authority under 42 U.S.C. §1857f-6c(c)(1) and has pre-empted the field of such regulation, thus barring any State or local control of the lead content of gasoline which is not identical to the federal regulation.

3. As is more fully set forth in the affidavit of Richard A. Rabinow, defendants seek to compel plaintiff to reduce the lead content of its regular and premium gasoline intended for use in New York City to a level of 0.5 g/gal. by March 30, 1973 and June 28, 1973, respectively. Defendants purport to act in this regard pursuant to §1403.2-13.11(a)(3) of Chapter 57 of the Administrative Code of the City of New York, as modified by the terms of the Order of February 16, 1973 of the Administrator of the New York City Environmental Protection Administration ("City Administrator"). Moreover, §1403.2-13.11(a)(4) further requires plaintiff to reduce the lead content of all grades of its gasoline to 0 g/gal. by January 1, 1974.

4. The pre-emptive federal regulation of the lead content of gasoline permits plaintiff to continue to sell gasoline without any restriction as to its lead content until July 1, 1974, at which time at least one grade of plaintiff's gasoline must be substantially

lead-free. If plaintiff abides by the terms of the federal regulation however, it will be in violation of the City's lead content restrictions which require almost immediate reduction of the lead content of all grades of gasoline and elimination of lead in all grades of gasoline less than 9 months from now. Such a violation subjects plaintiff to a fine of not less than \$50.00 nor more than \$200.00, or to imprisonment for not more than 30 days, or both, for each shipment or delivery of fuel which does not meet the City's lead restrictions. In 1972, plaintiff sold 129,800,000 gallons of gasoline in New York City and, while the precise number of shipments or deliveries is not known, the potential penalties to which plaintiff is subject for non-compliance with the City's lead content restrictions are horrendous in their magnitude.

5. On the other hand, if plaintiff abandons the prescribed federal program for the nation-wide reduction of the lead content of gasoline and complies with the City's lead restrictions, no useful purpose will be served since an insignificant reduction of one isolated particulate (i.e. lead salts) on a local basis only will not demonstrably improve the City's air resources. Moreover, compliance with the City's lead restrictions (a) will divert technological research and development resources from the program plaintiff must undertake on a nation-wide basis in order to comply with the current federal regulation, (b) will require a disproportionate concentration and segregation of



blending, storage and distribution facilities for gasoline intended for use in the City, (c) will, in addition to the already substantial expenditures incurred in reducing the lead content to 1 g/gal., further increase the cost of producing gasoline for the City by at least \$500,000 annually simply to comply with the 0.5 g/gal. restriction and ultimate reduction to the 0 g/gal. level will substantially enlarge the cost of producing gasoline for the City in an amount not yet quantified, (d) will require more lead to be added to gasoline produced for sale outside the City since high octane components, which are in limited supply, will be diverted to gasoline produced for New York City thus requiring additional lead to increase the octane rating of non-New York City gasoline, (e) will require additional net energy input (e.g., more crude oil) to produce an equivalent amount of lead-free gasoline, and (f) at such time as the 0 g/gal. restriction is enforced, will adversely affect the performance characteristics of today's motor vehicles which are not designed to run on lead-free fuel and thus retard the rate of air quality improvement by increasing the non-lead mass exhaust emissions from such motor vehicles.

6. Plaintiff is thus confronted with a local law which has been pre-empted by federal action but whose violation subjects plaintiff to substantial civil and criminal penalties. Since plaintiff must either comply with or violate the local law by March 30, 1973, immediate injunctive and declaratory relief is necessary in order to avoid the drastic consequences of these two alternative courses of action.



7. Plaintiff requests a preliminary injunction staying any enforcement of §1403.2-13.11(a) (3) and (4) and barring the imposition of any penalties for failure to comply with §1403.2-13.11(a) (3) and (4). Plaintiff also requests certification for prompt trial or other disposition with respect to Count I of the complaint herein pursuant to Rule 4(C) of the Individual Assignment And Calendar Rules of this Court. Plaintiff is prepared, with the permission of the Court, to file a motion for summary judgment with respect to Count I pursuant to Rule 56(a) of the Federal Rules of Civil Procedure.

8. Assuming that this Court grants plaintiff's request for prompt disposition in this action, no harm will result to defendants through the issuance of a preliminary injunction herein. Even in the absence of a prompt disposition, defendants will not suffer harm as a result of the issuance of a preliminary injunction. Defendants have already suspended enforcement of §1403.2-13.11(a) (3) for three months (i.e., to March 30, 1973) with respect to the lead content of regular gasoline and for six months (i.e., to June 28, 1973) with respect to the lead content of premium gasoline. Any slight delay which may occur while this Court considers the merits of this action will not damage defendants or prevent the ultimate enforcement of §1403.2-13.11 should it be upheld. Thus no security pursuant to Rule 65(c) of the Federal Rules of Civil Procedure should be required.

9. Plaintiff seeks to bring on the motion for a preliminary injunction by order to show cause since the first compliance date under the City Administrator's Order is March 30, 1973. As is more fully set forth in the affidavit of Richard A. Rabinow, a minimum period of 6 weeks is required for plaintiff to make the technological conversions necessary to meet the 0.5 g/gal. lead content requirement. Only 3 weeks now remain to prepare for compliance with the City Administrator's Order, should such Order and the law upon which it is based not be enjoined nor declared null and void by this Court. Thus, there is insufficient time to proceed by notice of motion.

10. No previous application has been made for the relief sought herein.

\_\_\_\_\_  
Robert L. Clare, Jr.

Sworn to before me this  
day of March, 1973.

\_\_\_\_\_  
Notary Public

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x	
EXXON CORPORATION,	:
Plaintiff,	: 73 Civ.
-against-	:
THE CITY OF NEW YORK; ENVIRONMENTAL	: AFFIDAVIT IN
PROTECTION ADMINISTRATION OF THE	: SUPPORT OF
CITY OF NEW YORK; and ADMINISTRATOR	: PLAINTIFF'S
OF THE ENVIRONMENTAL PROTECTION	: APPLICATION FOR
ADMINISTRATION OF THE CITY OF	: AN ORDER TO SHOW
NEW YORK,	: CAUSE AND MOTION
	: FOR A PRELIMINARY
	: <u>INJUNCTION</u>
Defendants.	:
-----x	

STATE OF NEW YORK     )  
                              :  
COUNTY OF NEW YORK    )

Richard A. Rabinow, being duly sworn, deposes  
and says:

1. I am a Supervisor of the Economics Section  
at the Bayway Refinery of plaintiff, Exxon Corporation.  
I hold Bachelor's and Master's Degrees in Mechanical  
Engineering and a Master's Degree in Business Administra-  
tion and I am responsible for the evaluation of the eco-  
nomic alternatives in the refining operations at plain-  
tiff's Bayway Refinery over the period of the next two  
years.



2. This affidavit is respectfully submitted in support of a motion for a preliminary injunction against defendants' attempt to enforce the provisions of §1403.2-13.11(a)(3) and (4) of Chapter 57 of the Administrative Code of the City of New York.

3. On February 16, 1973, I was notified that the Administrator of the New York City Environmental Protection Administration ("City Administrator") had denied plaintiff's application for a variance from the provisions of §1403.2-13.11 of Chapter 57 of the Administrative Code which require plaintiff to reduce the lead content by weight of its gasoline intended for use in New York City to 0.5 grams per gallon ("g/gal.") in 1973 and to 0 g/gal. by January 1, 1974. I was further notified that plaintiff is required to achieve this reduction by March 30, 1973 with respect to its regular gasoline (i.e., gasoline with an octane rating below 95.9) and by June 28, 1973 with respect to its premium gasoline (i.e., gasoline with an octane rating of 95.9 and above). In 1972, plaintiff's total gasoline sales in the City of New York amounted to 129,800,000 gallons, almost half of which was regular grade gasoline. Thus, plaintiff is required to reduce the lead content of a substantial amount of its gasoline sold in New York City to 0.5 g/gal. by March 30, 1973.

4. The technological conversion process required in order to reduce the lead content of plaintiff's regular gasoline to 0.5 g/gal. generally consists of (a)

alteration of chemical components used in the gasoline refining and blending process, (b) segregation of blending, storage and distribution facilities utilized for gasoline intended for use in New York City and (c) flushing of blending, storage and distribution facilities utilized for gasoline intended for use in New York City in order to avoid contamination from residual lead. In addition, approximately 400 industrial and consumer gasoline tanks must be pumped out or corrected before delivery of 0.5 g/gal. leaded gasoline commences. This process requires a minimum period of six weeks and its initial implementation cost will be \$112,000. Thereafter, in order to maintain the octane rating of its gasoline with reduced lead content, plaintiff will be required to bring in or transfer additional high octane components for preparation of gasoline intended for use in New York City. Since such high octane components are in limited supply and will be disproportionately concentrated in gasoline sold in New York City, plaintiff will be required to increase the lead content of gasoline sold outside New York City in order to maintain the octane rating of such gasoline. In addition to the initial implementation cost of \$112,000, the annual cost to plaintiff thereafter of compliance with New York City's 0.5 g/gal. lead content restriction is estimated to exceed \$500,000. This cost does not include the more substantial expenditures already incurred by plaintiff in reducing the lead content of its gasoline to 1 g/gal.



5. In addition to the above described, quantifiable difficulties in attaining the City's required lead content levels, there are additional, significant problems which are not presently subject to precise measurement. First, shipments from plaintiff's Gulf Coast refineries of the high octane components necessary to meet the City's reduced lead and lead-free gasoline requirements will cause scheduling problems at the Bayway Refinery and introduces the risk of interruptions in the blending process since such shipments will be subject to delay. Second, greater care must be exercised in the blending process at the Bayway Refinery because of the increased number of blends required and the decreased tolerance for error in the use of additional high octane components. And third, the time and facilities available at the Bayway Refinery for the blending of gasolines for areas outside New York City will be reduced as a disproportionate amount of such time and facilities are concentrated on the production of gasoline for New York City.

6. The removal of lead, which is an important source of "octane boost" in the refining process, will require that a more intensive process be employed in refining gasoline intended for use in New York City. The production of high octane components without the addition of lead reduces the yield per barrel of crude oil refined and increases the energy required to process that crude oil. Thus, production of an equivalent amount of high octane gasoline without the use of lead will require the processing of additional amounts of crude



oil. Given the limited supply of crude oil available to plaintiff generally, New York City's lead content restrictions require greater amounts of crude oil to be segregated for the City's gasoline requirements with a resulting decrease in the amount of crude oil available to serve the energy requirements of all areas outside the City.

7. The current federal regulation of the lead content of gasoline, which provides for the nationwide availability of at least one grade of lead-free gasoline by July 1, 1974, does not require the disproportionate concentration of refining, blending, storage and distribution facilities, nor does it seek to divert the raw materials necessary to make lead-free gasoline available to those purchasing gasoline in all areas of the United States.

8. Plaintiff is now attempting to plan the costly and time-consuming process of technological conversion necessary to meet the federal requirement of at least one grade of lead-free gasoline by July 1, 1974. Yet plaintiff is confronted with the City's local law which requires an immediate reduction in lead content to 0.5 g/gal. and a reduction to 0 g/gal. by January 1, 1974 for all grades of its gasoline. This dilemma compounds to a significant degree the already difficult task of planning for compliance with the federal lead reduction schedule.

9. As is more fully set forth in paragraph 4 above, a minimum period of six weeks is required for the technological conversion and segregation of fuel which would meet the City's restriction of 0.5 g/gal. lead content. Unless defendants are enjoined from enforcing this restriction while the Court considers plaintiff's request for relief, plaintiff will suffer irreparable injury in that: (1) plaintiff is subject to substantial civil and criminal penalties pursuant to §1403.2-15.25(d) of Chapter 57 of the Administrative Code of the City of New York if it fails to comply with the City's lead restrictions; (2) in the event of such non-compliance, plaintiff could be barred from marketing its gasoline in New York City; (3) in the event of attempted compliance, plaintiff will be unable, without substantial expenditures, to supply its customers in the City with sufficient gasoline resulting in loss of business and good will; (4) plaintiff is now unable, without substantial expenditures, to enter into or continue to honor contracts which call for the shipment or delivery of regular gasoline to New York City after March 30, 1973; (5) the cost of simply complying with the New York City lead restriction of 0.5 g/gal. would exceed \$500,000 annually in addition to the substantial expenditures already incurred in reducing the lead content to 1 g/gal.; and (6) an attempt to comply with the New York City lead standard would disrupt plaintiff's overall technological and financial plans for compliance



with the current federal regulation and would divert additional crude oil resources to the production of gasoline for New York City at the expense of the remainder of the nation.

\_\_\_\_\_  
Richard A. Rabinow

Sworn to before me  
this       day of  
March, 1973

\_\_\_\_\_  
Notary Public



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x  
GETTY OIL CO. (Eastern Operations) : 73 Civ 1093  
INC., GULF OIL CO. - U.S., MOBIL : (CES)  
OIL CORPORATION and SUN OIL :  
COMPANY OF PENNSYLVANIA, :  
  
Plaintiffs, :  
  
-against- : STIPULATION  
  
THE CITY OF NEW YORK, HERBERT ELISH, :  
Environmental Protection Administrator :  
of the City of New York, and :  
THE ENVIRONMENTAL PROTECTION :  
ADMINISTRATION OF THE CITY OF NEW YORK, :  
  
Defendants. :

----- x

IT IS HEREBY STIPULATED AND AGREED, by and  
between the undersigned, attorneys for the respective  
parties in the above-captioned matter, that the COMPLAINT  
be supplemented and amended by adding the following paragraphs  
marked 11(A) and 12(A):

Paragraph 11.(A) Acting pursuant to Section 211  
of the Clean Air Act (42 U.S.C. §1857f-6c), on or about  
the 28th day of November, 1973, the Federal Environmental  
Protection Agency, by its Acting Administrator John Quarles,  
promulgated an amendment to Part 80, Chapter I, Title 40,  
Code of Federal Regulations. A copy of said amendment is  
attached hereto and marked Exhibit A, and made a part hereof  
as though fully set forth herein.

Paragraph 12.(A) The aforesaid amendment to the Code of Federal Regulations was published in the Federal Register, Vol. 38, No. 234 on December 6, 1973, and became effective on January 7, 1974.

IT IS FURTHER STIPULATED AND AGREED that defendants' time to answer the complaint as supplemented and amended is extended until January 18, 1974

Dated: New York, New York  
January 9, 1974

SHEA GOULD CLIMENKO & KRAMER

By *Julius J. Kramer*  
A Member of the Firm  
Attorneys for Plaintiffs  
330 Madison Avenue  
New York, New York 10017

OFFICE OF THE CORPORATION COUNSEL

By *John A. L...*  
Attorneys for Defendants  
Municipal Building, Civic Center  
Chambers and Center Streets  
New York, New York 10007

SO ORDERED:

*/s/ Charles E. Stewart*  
U.S.D.J.



## RULES AND REGULATIONS

33711

and may be contrasted readily with the requirements of section 202(b) of the Act specifically identifying carbon monoxide, hydrocarbons, and oxides of nitrogen for regulatory action. While, as the commentator points out, language in the Senate Report on its version of the 1970 Clean Air Act amendments stated that the bill would require issuance of a criteria document for lead, this must be construed as only a statement of the Committee's preference, since no such requirement appeared either in the language of the Senate or the conferees' bill. The regulations promulgated below shall be effective on January 7, 1973.

(42 U.S.C. 18577-6c, 1857g(a))

Dated: November 28, 1973.

JOHN QUARLES,  
Acting Administrator,  
Environmental Protection Agency.

Part 80 of Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

1. In § 80.1, the second sentence is revised to read as follows:

§ 80.1 Scope.

... These regulations are based upon a determination by the Administrator that the emission product of a fuel or additive will endanger the public health, or will impair to a significant degree the performance of a motor vehicle emission control device in general use or which the Administrator finds has been developed to a point where in a reasonable time it would be in general use were such regulations promulgated; and certain other findings specified by the Act.

2. In § 80.2, a new paragraph (m) is added as follows:

§ 80.2 Definitions.

(m) "Lead additive manufacturer" means any person who produces a lead

additive or sells a lead additive under his own name.

3. A new § 80.20 is added as follows:

§ 80.20 Controls applicable to gasoline refiners.

(a) (1) In the manufacture of gasoline at any refinery, no gasoline refiner shall exceed the average lead content per gallon specified below for each 3-month period (January through March, April through June, July through September, October through December):

- (i) 1.7 grams of lead per gallon, after January 1, 1975;
- (ii) 1.4 grams of lead per gallon, after January 1, 1976;
- (iii) 1.0 grams of lead per gallon, after January 1, 1977;
- (iv) 0.8 grams of lead per gallon, after January 1, 1978;
- (v) 0.5 grams of lead per gallon, after January 1, 1979.

(2) For each 3-month period (January through March, April through June, July through September, October through December) the average lead content per gallon shall be computed by dividing total grams of lead used at a refinery in the manufacture of gasoline by total gallons of gasoline manufactured at such refinery.

(3) For each 3-month period (January through March, April through June, July through September, October through December) commencing with the period January 1, 1975 through March 31, 1975, each refiner shall submit to the Administrator a report showing for each refinery (i) the total grams of lead in lead additive inventory on the first day of the period, (ii) the total grams of lead received during the period, (iii) the total grams of lead in lead additive inventory on the last day of the period, (iv) the total gallons of gasoline produced by such refinery during the period, and (v) the average lead content in each gallon

of gasoline produced during the period. Reports shall be submitted within 15 days after the close of the reporting period, on forms supplied by the Administrator upon request.

(b) The provisions of paragraph (a) (1) (i) and (ii) of this section shall not be applicable to any refiner which does not have more than 30,000 barrels per day crude oil or bona fide feed stock capacity from owned or leased facilities or from facilities made available to such refiner under an arrangement such as, but not limited to, an exchange agreement (except one on a refined product for refined product basis), or a throughput or other form of processing agreement, with the same effects as though such facilities had been leased.

4. A new § 80.23 is added as follows:

§ 80.23 Controls applicable to lead additive manufacturers.

For each 3-month period (January through March, April through June, July through September, October through December) commencing with the period January 1, 1975 through March 31, 1975, each lead additive manufacturer shall submit to the Administrator a report showing the total grams of lead shipped to each refinery by such lead additive manufacturer during the period. Reports shall be submitted within 15 days after the close of the reporting period, on forms supplied by the Administrator upon request.

5. A new § 80.26 is added as follows:

§ 80.26 Confidentiality of information.

Information obtained by the Administrator or his representatives pursuant to this part shall be treated, in so far as its confidentiality is concerned, in accordance with the provisions of 40 CFR Part 2.

[FR Doc. 73-25766 Filed 12-5-73; 8:45 am]



INDEX NO.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORKCITY OIL CO. (Eastern Operations)  
INC., CITY OIL CO.-U.S., MOBIL  
OIL CORPORATION and 319 OIL  
COMPANY OF PENNSYLVANIA,  
Plaintiffs,

-against-

THE CITY OF NEW YORK, HERBERT  
ELISH, Environmental Protection  
Administrator of the City of  
New York, and THE ENVIRONMENTAL  
PROTECTION ADMINISTRATION OF THE  
CITY OF NEW YORK,  
Defendants.STIPULATION

SHEA GOULD CLIMENKO &amp; KRAMER

230 MADISON AVENUE

NEW YORK, N.Y. 10017

MC 1-3000

Attorneys for Plaintiffs

SHEARMAN &amp; STERLIN

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

EXXON CORPORATION,

Plaintiff,

73 Civ. 1047

-against-

THE CITY OF NEW YORK; ENVIRONMENTAL  
PROTECTION ADMINISTRATION OF THE  
CITY OF NEW YORK; and ADMINISTRATOR  
OF THE ENVIRONMENTAL PROTECTION  
ADMINISTRATION OF THE CITY OF  
NEW YORK,

ANSWER

Defendants.

-----x

Defendants, by their Attorney, Adrian P. Burke,  
Corporation Counsel of the City of New York, answering the  
complaint herein:

1. Deny information or knowledge sufficient to form  
a belief as to the truth of each and every allegation con-  
tained in paragraph 1 of Plaintiff's complaint.

2. Deny the allegation in paragraph 3 of Plaintiff  
complaint that the Environmental Protection Administration  
is an administrative body appointed pursuant to the Adminis-  
trative Code of the City of New York. The Environmental  
Protection Administration was created pursuant to Chapter 57  
of the New York City Charter.

## AS TO COUNT I OF PLAINTIFF'S COMPLAINT:

3. Deny the allegation in paragraph 7 of  
Plaintiff's complaint that §1403.2-13.11 of the Administrative  
Code of the City of New York was added on August 25, 1971.



Section 1403.2-13.11 was added on August 20, 1971.

4. Deny each and every allegation contained in paragraph 11 of Plaintiff's complaint, except admit that on January 10, 1973 the Administrator of the Federal Environmental Protection Agency published a regulation entitled "Regulation of Fuels and Fuel Additives", which regulation, effective February 9, 1973, provides that after July 1, 1974 sellers of gasoline must make generally available at least one grade of gasoline with a lead content of not more than 0.05g/gal.

5. Deny each and every allegation contained in paragraph 11a of Plaintiff's complaint, except admit that on December 6, 1973 there were published fuel regulations entitled "Control of Lead Additives in Gasoline." These regulations were promulgated by the Acting Administrator of the Environmental Protection Agency in part upon the finding that lead particle emissions from motor vehicles present a significant risk of harm to the health of urban populations, particularly to the health of city children. The regulation, effective January 7, 1974 provides that after January 1, 1975 no gasoline refiners for each 3-month period, shall exceed the average lead content per gallon of 1.7 g/gal; after January 1, 1976 of 1.4 g/gal; after January 1, 1977 of 1.0 g/gal; after January 1, 1978 of 0.8 g/gal; and after January 1, 1979 0.5 g/gal.

6. Deny each and every allegation contained in paragraph 14 of Plaintiff's complaint.



7. Deny each and every allegation contained in paragraphs 15 of Plaintiff's complaint, except admit that the description of the City's restrictions on the lead content of gasoline conforms to the variance granted Plaintiff on February 16, 1973 and that said restrictions are not identical to any control or prohibition prescribed by the Federal Administrator.

8. Deny each and every allegation in paragraphs 16, 17, 18 and 19 of Plaintiff's complaint.

AS TO COUNT II OF PLAINTIFF'S COMPLAINT:

9. As to the allegations contained in paragraph 20 of Plaintiff's complaint, Defendants reassert and reallege paragraphs 3, 4, 5, 6, 7, 8, 9, 10 and 11 of their answer herein.

10. Deny information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph 23 of Plaintiff's complaint.

11. Deny each and every allegation contained in paragraphs 24 and 25 of Plaintiff's complaint.

WHEREFORE, Defendants demand judgment dismissing Plaintiff's complaint herein, together with the costs and disbursements of this action.

January 18, 1974.

ADRIAN P. BURKE  
Corporation Counsel  
Attorney for Defendants  
1626 Municipal Building  
New York, N.Y. 10007  
566-2515

By

  
EVAN A. DAVIS  
Assistant Corporation Counsel

Of Counsel:

EVAN A. DAVIS  
EVELYN J. JUNGLE

72a

Index No. .... Year 19.....

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

EXXON CORPORATION,  
Plaintiff,

-against-

THE CITY OF NEW YORK,  
ENVIRONMENTAL PROTECTION  
ADMINISTRATION OF THE CITY  
OF NEW YORK; et ano.,

Defendants

ANSWER

ADRIAN P. BUNN  
NORMAN REDLICH,

Corporation Counsel,

Attorney for ..... Defts.

Municipal Building,

New York, N. Y. 10007

Due and timely service of a copy of the  
within  
is hereby admitted.

New York, ..... 19.....

Attorney for .....

To

Attorney for ..... Esq.,

RECEIVED  
BY HAND

ORIGINAL COPY  
FOR DOCUMENT FOLDER

42

To: Shearman & Sterling  
Attorneys for Plaintiff  
55 Wall Street

C. J. Freeman  
4/17/74



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
GETTY OIL CO. (Eastern Operations),  
INC., GULF OIL CO. - U.S., MOBIL  
OIL CORPORATION, and SUN OIL  
COMPANY OF PENNSYLVANIA,

73 Civ. 1093  
(CES)

ANSWER

Plaintiffs,

-against-

THE CITY OF NEW YORK, HERBERT LLISH,  
Environmental Protection Administrator  
of the City of New York, and THE  
ENVIRONMENTAL PROTECTION ADMINISTRATION  
OF THE CITY OF NEW YORK,

Defendants.

-----x  
Defendants, by their attorney, ADRIAN P. BURKE,  
Corporation Counsel of the City of New York, answering the  
complaint herein:

1. Deny information and knowledge sufficient  
to form a belief as to the truth of each and every allegation  
contained in paragraph 1, 2, 3 and 4 of plaintiffs' complaint,  
except admit plaintiffs' business is conducted in inter-  
state commerce and within the City of New York.

AS TO COUNT ONE:

2. Deny each and every allegation contained in  
paragraph 15 of plaintiffs' complaint.

3. Deny each and every allegation contained in  
parts (a) and (b) of paragraphs 16 of plaintiffs' complaint,  
except admit that effective August 20, 1971 Local Law  
No. 49 of 1971 added to the Administrative Code a new  
Chapter 57 which is the Air Pollution Control Code, and that  
said Code contains certain specifications concerning the



lead content and other physical characteristics of gasoline offered for sale within the City of New York, which lead restrictions are not identical to regulations promulgated by the Federal Environmental Protection Agency Administrator.

4. Deny each and every allegation contained in paragraph 20 of plaintiffs' complaint, except admit that Local Law No. 49 of 1971 was enacted by the City Council with full knowledge of the federal Clean Air Act and that the terms of the variance granted plaintiffs by the City EPA Administrator on February 16, 1973 are set out in parts (b)(i) and (ii) of said paragraph.

5. Deny each and every allegation contained in paragraph 21 and 22 of plaintiffs' complaint.

AS TO COUNT II OF  
PLAINTIFFS' COMPLAINT:

6. As to paragraph 23 of plaintiffs' complaint, defendants reassert and reallege paragraphs 2, 3, 4 and 5 above of their answer herein.

7. Deny information or knowledge sufficient to form a belief as to the truth of each and every allegation contained in paragraph 26 of plaintiffs' complaint, except admit that New York City is located between the States of New Jersey, and Connecticut, and the counties of Westchester and Nassau in New York State.

8. Deny each and every allegation contained in paragraph 27 of plaintiffs' complaint, except admit that gasoline moves in interstate commerce.

9. Deny each and every allegation contained in paragraphs 28, 29 and 30 of plaintiffs' complaint.

10. Deny information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph 31 of plaintiffs' complaint, except admit that plaintiffs' failure to comply with Local Law No. 49 would subject them to possible criminal and civil penalties and admit that defendants have the power to seek equitable relief in the enforcement of the provisions of Local Law No. 49.

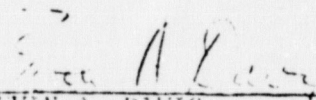
11. Deny each and every allegation contained in paragraphs 32 and 33 of plaintiffs' complaint.

WHEREFORE, defendants demand judgment dismissing plaintiffs' complaint, together with the costs and disbursements of this action.

January 18, 1974

ADRIAN P. BURKE  
Corporation Counsel  
Attorney for Defendants  
1626 Municipal Building  
New York, N.Y. 10007  
566-2515

By

  
EVAN A. DAVIS  
Assistant Corporation Counsel

of Counsel:

EVAN A. DAVIS  
EVELYN J. JUNG



Index No. 73 Civ 1093 Year 19.....

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

GETTY OIL CO. (Eastern  
Operations), Inc., et al.,

Plaintiffs,

-against-

THE CITY OF NEW YORK, HERBERT  
ELISH, Environmental  
Protection Administrator of  
the City of New York; et ano.,

Defendants.

ANSWER

~~ABRAHAM P. DORSEY~~  
~~NORMAN FREDLICH,~~

Corporation Counsel,

Attorney for Defts.

Municipal Building,

New York, N. Y. 10007

Due and timely service of a copy of the  
within  
is hereby admitted.

New York, ..... 19.....

Attorney for

To

Attorney for ..... Esq.,

CPM RECEIVED  
1974 JAN 18 PM 1:24

SHC  
R.F. [Signature]

To: SHEA, GAILD. CILLENKO & KILMER

330 Madison Avenue

Attorneys for Plaintiffs

M

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x  
:  
GETTY OIL CO. (Eastern Operations), INC., :  
GULF OIL CO. - U.S., MOBIL OIL :  
CORPORATION and SUN OIL COMPANY OF :  
PENNSYLVANIA, : 73 Civ. 1093 (CES)

-against- Plaintiffs, :  
:  
ORDER TO  
SHOW CAUSE

THE CITY OF NEW YORK, HERBERT ELISH, : **RE SUMMARY JUDGMENT**  
Environmental Protection Administrator :  
of the City of New York, and THE :  
ENVIRONMENTAL PROTECTION ADMINISTRATION :  
OF THE CITY OF NEW YORK, :

Defendants. :  
----- x

Upon the affidavit of Miles F. McDonald, Esq., sworn to  
January 7, 1974, the summons and complaint herein, plaintiffs'  
memorandum of law and the exhibits annexed thereto, and all  
prior proceedings had herein, the defendants are hereby

*CW*  
ORDERED to show cause before Honorable Charles E.  
Stewart, United States District Judge in Room 102, New York,  
New York on the 31 day of Jan, 1974, at 10:00 o'clock in  
the forenoon, or as soon thereafter as counsel can be heard, why  
an order should not be made pursuant to Rule 56 of the Federal  
Rules of Civil Procedure, granting plaintiffs summary judgment  
on the first cause of action in the above-entitled action on the  
ground that promulgation of Federal Gasoline Regulations published  
in the Federal Register on December 6, 1973 and effective on  
January 7, 1974 have preempted non-identical regulations as set  
forth in Local Law No. 49 thereby rendering such regulations null  
and void under the Supremacy Clause of the Constitution of the  
United States; and granting such other and further relief as this  
Court may deem just and proper; and it is further



ORDERED that personal service of a copy of this order and the papers upon which it is based by delivery thereof to the office of the Corporation Counsel of the City of New York, attorneys for the defendants on or before **JAN 25**, 1974 shall be sufficient service thereof.

✓  
✓  
**BY 4 PM**

Dated: New York, New York  
January **24**, 1974

*s/ Charles E Stewart*

Charles E. Stewart, U. S. D. J.

USPS

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x  
GETTY OIL CO. (Eastern Operations), INC., :  
GULF OIL CO. - U.S., MOBIL OIL CORPORATION :  
and SUN OIL COMPANY OF PENNSYLVANIA, :

Plaintiffs, :

-against- :

THE CITY OF NEW YORK, HERBERT ELISH, :  
Environmental Protection Administrator of :  
the City of New York, and THE ENVIRONMENTAL :  
PROTECTION ADMINISTRATION OF THE CITY OF :  
NEW YORK, :

Defendants. :  
----- x

73 Civ. 1093 (CES)

AFFIDAVIT

STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

OFFICE OF CORPORATION CLERK  
CITY OF NEW YORK  
74 JAN 24 PM 4:09

MILES F. McDONALD, being duly sworn, deposes and says:

1. I am an attorney at law and a member of the firm of Shea Gould Climenko & Kramer, attorneys for plaintiffs in the above-entitled action, and I submit this affidavit in support of plaintiffs' instant application for summary judgment on the first cause of action declaring Sections 1403.2 - 13.11 and 1403.2 - 13.12 of Local Law No. 49 null and void under the Supremacy Clause of the United States Constitution, having been preempted by the federal regulations promulgated under the Clean Air Act, as amended, 42 U.S.C. § 1857f-6c.

2. Plaintiffs instituted this action by service of a summons and complaint seeking declaratory and injunctive relief against the enforcement of aforesaid section of Local Law No. 49 which prescribe the maximum lead content and other physical characteristics of gasoline sold in New York City. Plaintiffs' instant application is based solely on the issue of preemption, and is not addressed to Count Two of the complaint which alleges that Local Law No. 49 imposes an impermissible burden on



interstate commerce. Should plaintiffs succeed on the question of preemption, however, we respectfully submit that Count Two will be moot and may be dismissed without prejudice.

3. The question of preemption is solely an issue of law, and the various statutes and regulations upon which plaintiffs' claim of preemption is based are stated in plaintiffs' memorandum of law submitted herewith.

4. Defendants' answer to paragraphs 1, 2, 3 and 4 of plaintiffs' complaint is a pro forma denial, and we cannot believe that defendant, City of New York, seriously questions the existence of the plaintiff corporations whose names are household words. Certainly such denials do not raise triable issues of fact. Copies of the pleadings are annexed hereto as Exhibits 1 and 2.

5. Paragraph 15 of the complaint which is denied by the answer is only a statement of the issue which must be determined by this Court on this motion.

6. Defendants' denial of paragraph 16 of the complaint contains an admission of the most salient feature of the allegations contained therein--that is, that Local Law No. 49 contains certain specifications and restrictions concerning the lead content and other physical characteristics of gasoline sold in New York City which are not identical to regulations promulgated by the Federal Environmental Protection Agency Administrator.

7. In connection with a motion before the Court of Appeals, Docket No. 73-1497, for a continuance of a stay granted by Your Honor pending the determination of an appeal, Evan A. Davis, attorney for defendant City of New York, submitted an affidavit. Said affidavit, sworn to April 9, 1973, stated:

"The City argued that § 211(c)(4)(A) of the Clean Air Act, 42 U.S.C. § 1857f - 6(c)(4)(A), was not intended to pre-empt a local health standard restricting the lead content of gasoline until the Federal Administrator had promulgated a nationwide health standard." (Emphasis added.)

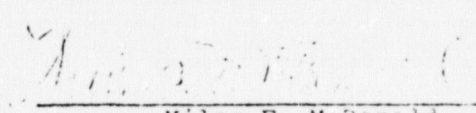
Indeed, in a prior proceeding in this action wherein plaintiffs sought a preliminary injunction, your Honor held in a memorandum decision dated March 22, 1973:

"It is clear in this instance that Congress recognized the difference between the need for standards to regulate the use of fuel for protection of control devices and the need for such standards for health and safety purposes. The Federal Administrator has acted with regard for the first stated purpose but has not yet acted with regard to the health standard. Until he does, the City of New York is free to enact and enforce its own regulations." (Emphasis added.)

The Federal Administrator has now acted "with regard to the health standard." Acting pursuant to Section 211 of the Clean Air Act (42 U.S.C. § 1857f-6c), on or about the 28th day of November, 1973, the Federal Environmental Protection Agency, by its Acting Administrator, John Quarles, promulgated an amendment to Part 80, Chapter I, Title 40, Code of Federal Regulations, providing for a nationwide health standard concerning lead additives in gasoline. The amendment was published in the Federal Register, Vol. 38, No. 234 on December 6, 1973 and became effective January 7, 1974. Under such circumstances, we respectfully submit that the City of New York is no longer free to enforce its own non-identical regulations.

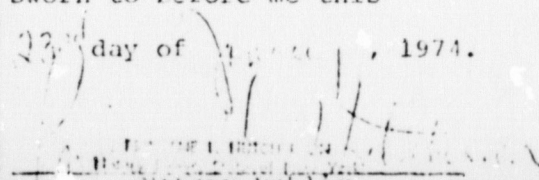
8. This application is made by way of Order to Show Cause rather than by the usual notice with motion because of the emergency which faces all of the plaintiffs in the operation of their business in the City of New York. No previous application has been made for the relief sought herein except as indicated in this affidavit.

WHEREFORE, we respectfully request that the relief sought by plaintiffs be granted in all respects.

  
Miles F. McDonald

Sworn to before me this

23<sup>rd</sup> day of January, 1974.

  
Notary Public



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
GETTY OIL CO. (Eastern Operations),  
INC., GULF OIL CO. - U.S., MOBIL  
OIL CORPORATION, and SUN OIL COM-  
PANY OF PENNSYLVANIA,

Plaintiffs,

-against-

THE CITY OF NEW YORK, HERBERT  
ELISH, Environmental Protection  
Administrator of the City of New  
York, and THE ENVIRONMENTAL PRO-  
TECTION ADMINISTRATION OF THE  
CITY OF NEW YORK,

Defendants. :  
-----X

COMPLAINT

Plaintiffs Getty Oil Co. (Eastern Operations), Inc.,  
Gulf Oil Co. - U.S., Mobil Oil Corporation, and Sun Oil Com-  
pany of Pennsylvania, by their attorneys Shea Gould Climenko &  
Kramer, for their complaint, allege:

1. Getty Oil Co. (Eastern Operations), Inc. ("Getty")  
is, and at all times relevant to this complaint was, a cor-  
poration, duly organized and existing under and by virtue of  
the laws of the State of Delaware, qualified to do business  
in the State of New York and engaged in the refining, distribu-  
tion, transportation, storage and sale of gasoline for use in  
the operation of motor vehicles. Getty's business is conducted  
in interstate commerce in and among the several states, includ-  
ing, but not limited to, the State and City of New York.

2. Gulf Oil Co. - U.S. ("Gulf") is, and at all times  
relevant to this complaint was, a corporation, duly organized  
and existing under and by virtue of the laws of the State of  
Pennsylvania, qualified to do business in the State of New York

and engaged in the refining, distribution, transportation, storage and sale of gasoline for use in the operation of motor vehicles. Gulf's business is conducted in interstate commerce in and among the several states, including, but not limited to, the State and City of New York.

3. Mobil Oil Corporation ("Mobil") is, and at all times relevant to this complaint was, a corporation, duly organized and existing under and by virtue of the laws of the State of New York and engaged in the refining, distribution, transportation, storage and sale of gasoline for use in the operation of motor vehicles. Mobil's business is conducted in interstate commerce in and among the several states, including, but not limited to, the State and City of New York.

4. Sun Oil Company of Pennsylvania ("Sun") is, and at all times relevant to this complaint was, a corporation, duly organized and existing under and by virtue of the laws of the State of Pennsylvania and engaged in the refining, distribution, transportation, storage and sale of gasoline for use in the operation of motor vehicles. Sun's business is conducted in interstate commerce in and among the several states, including, but not limited to, the State and City of New York.

5. Defendant City of New York is, and at all times relevant to this complaint was, a municipal corporation, existing by virtue of a Charter granted by the State of New York, political subdivisions of which are located in the Southern District of New York.

6. Upon information and belief, on or about February 16, 1973, defendant Herbert Elish ("Elish") was duly appointed to succeed Jerome Kretzmer as Administrator of The Environmental Protection Administration of the City of New York, and



since the time of his appointment has acted in that capacity pursuant to the Administrative Code of the City of New York.

7. Defendant The Environmental Protection Administration of the City of New York (the "City E.P.A.") is, and at all times relevant to this complaint was, an administrative body, acting pursuant to the Administrative Code of the City of New York, and having its principal office in the Southern District of New York.

#### COUNT ONE

8. This claim for declaratory and injunctive relief is brought pursuant to the Supremacy Clause (Article VI, Clause 2) of the Constitution of the United States and 28 U.S.C. §2201.

9. The matter in controversy exceeds, exclusive of interests and costs, the sum of Ten Thousand Dollars (\$10,000). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1331(a) (Federal Question). Venue is proper pursuant to 28 U.S.C. §1391(b).

10. (a) On or about December 31, 1970, Congress amended the Clean Air Act (42 U.S.C. §1857 et seq.) by adopting the Clean Air Amendments of 1970 (Public Law 91-604; 84 Stat. 1676). The said Clean Air Amendments provide, inter alia, for the regulation of the lead content of motor vehicle fuels for the purpose of controlling the emissions thereof.

(b) Section 211 of the Clean Air Act, as amended (42 U.S.C. §1857f-6c), provides, in pertinent part:

"(c) (1) The Administrator may, from time to time on the basis of information obtained under subsection (b) of this section or other information available to him, by regulation,

control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle or motor vehicle engine (A) if any emission products of such fuel or fuel additive will endanger the public health or welfare, or (B) if emission products of such fuel or fuel additive will impair to a significant degree the performance of any emission control device or system which is in general use, or which the Administrator finds has been developed to a point where in a reasonable time it would be in general use were such regulation to be promulgated."

11. (a) Acting pursuant to Section 211 of the Clean Air Act (42 U.S.C. §1847f-6c), on or about January 10, 1973, the Federal Environmental Protection Agency, by its Administrator William D. Ruckelshaus, promulgated certain "Controls and Prohibitions" with respect to gasoline applicable to gasoline refiners, distributors and retailers (Part 80, Chapter I, Title 40, Code of Federal Regulations).

(b) The aforesaid regulations, as promulgated, provide, inter alia:

"§80.2 Definitions.

As used in this part:

\* \* \*

(e) 'Lead additive' means any substance containing lead or lead compounds.

(f) 'Leaded gasoline' means gasoline which is produced with the use of any lead additive or which contains more than 0.05 gram of lead per gallon or more than 0.005 gram of phosphorus per gallon.

(g) 'Unleaded gasoline' means gasoline containing not more than 0.05 gram of lead per gallon and not more than 0.005 gram of phosphorus per gallon.

\* \* \*

"§80.22 Controls applicable to gasoline retailers.

\* \* \*

(b) After July 1, 1974, every person who



owns, leases, operates, controls, or supervises a retail outlet at which 200,000 or more gallons of gasoline was sold during any calendar year beginning with the year 1971 shall offer for sale at least one grade of unleaded gasoline of not less than 91 Research Octane Number at such retail outlet: Provided, however, that the octane number of unleaded gasoline offered for sale in areas where altitude is greater than 2,000 feet may be reduced one (1) octane number for each succeeding 1,000 feet but not more than three (3) octane numbers in total.

(c) After July 1, 1974, every person who owns, leases, operates, controls, or supervises six or more retail outlets shall offer for sale at least one grade of unleaded gasoline of not less than 91 Research Octane Number at no fewer than 60 percent of such outlets: Provided, however, that the octane number of unleaded gasoline offered for sale in areas where altitude is greater than 2,000 feet may be reduced one (1) octane number for each succeeding 1,000 feet but not more than three (3) octane numbers in total."

12. (a) The aforesaid Federal regulations, as promulgated, were published in the Federal Register, Vol. 38, No. 6 on January 10, 1973.

(b) Section 311 of the Clean Air Act (42 U.S.C. §1857h-5) provides, in pertinent part:

"(b) (1) A petition for review of action of the Administrator in promulgating . . . any control or prohibition under section 1857f-6c . . . may be filed only in the United States Court of Appeals for the District of Columbia . . . . Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day."

(c) As of the date of the filing of this complaint, defendant City of New York has not filed any such petition for review of the aforesaid regulations as promulgated by the Administrator of the Federal Environmental Protection Agency, and the time within which to have done so has elapsed.

13. Section 211 of the Clean Air Act (42 U.S.C. §1857f-6c) also provides, in pertinent part:

"(4) (A) Except as otherwise provided in subparagraph (B) or (C), no State (or political subdivision thereof) may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any control or prohibition respecting use of a fuel or fuel additive in a motor vehicle or motor vehicle engine —

(i) if the Administrator has found that no control or prohibition under paragraph (1) is necessary and has published his finding in the Federal Register, or

(ii) if the Administrator has prescribed under paragraph (1) a control or prohibition applicable to such fuel or fuel additive, unless State prohibition or control is identical to the prohibition or control prescribed by the Administrator.

(B) Any State for which application of section 1857f-6a(a) of this title has at any time been waived under section 1857f-6a(b) of this title may at any time prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive.

(C) A State may prescribe and enforce, for purposes of motor vehicle emission control, a control or prohibition respecting the use of a fuel or fuel additive in a motor vehicle or motor vehicle engine if an applicable implementation plan for such State under section 1857c-5 of this title so provides. The Administrator may approve such provision in an implementation plan, or promulgate an implementation plan containing such a provision, only if he finds that the State control or prohibition is necessary to achieve the national primary or secondary ambient air quality standard which the plan implements."

14. The State of New York has never received a waiver as described in 42 U.S.C. §1857f-6c(c)(4)(B) nor has the State of New York filed an implementation plan, as described in 42 U.S.C. §1857f-6c(c)(4)(C), which has been approved by the Federal Administrator.

15. Thus, by prescribing the aforesaid regulations and controls with respect to gasoline, the Administrator of the Federal Environmental Protection Agency has preempted any regu-



latory action by any state, or political subdivision thereof, with respect to gasoline unless such regulation is identical to the prohibition or control prescribed by him.

16. (a) Notwithstanding the aforesaid provisions of the Clean Air Act, as amended, in or about July 1971, defendant City of New York adopted Local Law No. 49, amending its Administrative Code by adding thereto a new chapter entitled "Chapter 57 Environmental Protection Administration Part II-- Air Pollution Control Code" (hereinafter referred to as "Local Law No. 49").

(b) Local Law No. 49 contains, inter alia, provisions which purport to regulate the sale and use of gasoline for motor vehicles in the City of New York and to prohibit the sale or use, regardless of where purchased, of gasoline in the City of New York unless said gasoline meets certain specifications with respect to lead content and other physical characteristics thereof, which specifications are set by the City of New York and are not identical with the regulations promulgated by the Administrator of the Federal Environmental Protection Agency, as required by Section 211(c) (4) (A) of the Clean Air Act, as amended (42 U.S.C. §1857f-6c).

17. Article 13, Section 1403.2-13.11 of Local Law No. 49 provides, in pertinent part:

"§1403.2-13.11 Lead content of gasoline restricted.

(a) No person shall cause or permit the use, or, if intended for use in the City of New York, the purchase, sale, offer for sale, storage or transportation of gasoline which contains more than the following amount of lead by weight for the respective octane ranges as follows:

	<u>95.9 Octane No.* and Above</u>	<u>Below 95.9 Octane No.*</u>
(1) on and after November 1, 1971	2.0 grams per gal.	1.5 grams per gal.
(2) on and after January 1, 1972	1.0 grams per gal.	1.0 grams per gal.
(3) on and after January 1, 1973	0.5 grams per gal.	0.5 grams per gal.
(4) on and after January 1, 1974	zero grams	zero grams

\*The term octane number shall mean research octane number or rating measured by the research method.

(b) Where the lead content of gasoline is restricted to zero grams per gallon as in subsection a, gasoline which contains 0.075 grams of lead per gallon shall be deemed to meet such restriction."

18. (a) Article 13, §1403.2-13.12 of Local Law No. 49 also provides:

"Effective October 1, 1971, no person shall cause or permit the use, or, if intended for use in the city of New York, the purchase, sale, offer for sale, storage or transportation of gasoline which exceeds the following volatility limits:

(a) For the period October 1, through April 30, not to exceed 12 Reid vapor pressure.

(b) For the period May 1, through September 30, not to exceed 7 Reid vapor pressure."

(b) The aforesaid gasoline regulations promulgated by the Administrator of the Federal Environmental Protection Agency contain no provisions whatsoever as to volatility limits.

19. Local Law No. 49 contains other related provisions for administrative enforcement and for civil and criminal penalties which may be triggered by failure to comply with the provisions set forth therein.

20. (a) Local Law No. 49 was adopted by defendant City



of New York in haste and with full knowledge of the prior enactment by Congress of the Clean Air Act, as amended.

(b) With knowledge that the aforesaid Federal regulations with respect to gasoline became effective as of February 9, 1973, defendant City E.P.A., in a decision dated February 16, 1973, by Jerome Kretchmer, its then Administrator, declared that plaintiffs and other marketers of gasoline will be required to comply with the applicable provisions of §1403.2-13.11 as follows:

(i) by March 30, 1973, preparations must be completed for the supplying of conforming regular grade of gasoline, i.e., gasoline with an Octane No. below 95.9;

(ii) by June 28, 1973, preparations must be completed for the supplying of conforming premium grade gasoline, i.e., gasoline with an Octane No. of at least 95.9.

(c) Thus, plaintiffs have already become and will continue to be subjected to the substantive, administrative, civil and criminal provisions of Local Law No. 49, unless the declaratory and injunctive relief sought herein is granted by this Court.

21. By reason of all of the matters hereinabove alleged, the enactment and enforcement of Local Law No. 49 constitutes an unlawful attempt at the exercise of legislative power by defendant City of New York in contravention of the Clean Air Act, as amended, and in violation of the Supremacy Clause (Article VI, Clause 2) of the Constitution of the United States.

22. Plaintiffs have no adequate remedy at law.

23. Plaintiffs repeat and reallege paragraphs "8" through "22" hereinabove set forth as though the same were fully set forth herein.

24. This claim for declaratory and injunctive relief is brought pursuant to 28 U.S.C. §2201 and the Commerce Clause (Article I, Section 8, Clause 3) of the Constitution of the United States.

25. The matter in controversy exceeds, exclusive of interests and costs, the sum of Ten Thousand Dollars (\$10,000). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1331(a) (Federal Question) and 28 U.S.C. §1337 (Commerce). Venue is proper pursuant to 28 U.S.C. §1391(b).

26. The transportation, sale, wholesale and retail distribution (as conducted by plaintiffs and by the petroleum industry) and the purchase, consumption and use of gasoline by the public are activities which may be conducted in interstate commerce:

(a) Crude oil is produced in several states outside of the City and State of New York and in foreign countries.

(b) Crude oil is refined at facilities located outside the City and State of New York to make gasoline and other petroleum products, part of which is ultimately sold or used in the City and State of New York.

(c) Gasoline and other petroleum products are transported by pipeline and over water from outside the City and State of New York to locations both in or near the City



of New York for storage pending wholesale and retail distribution in the metropolitan area.

(d) Gasoline is stored for wholesale and retail distribution in tanks outside the City and State of New York, part of the contents of which is shipped into the City limits of the City of New York for sale therein.

(e) Gasoline is stored within the City limits of the City of New York in tanks for wholesale and retail distribution, part of which distribution is outside the City of New York and State of New York.

(f) Gasoline is sold at retail inside and outside the City and State of New York to operators of motor vehicles for use indiscriminately inside and outside of the limits of the City of New York or the State of New York.

(g) New York City is located between New Jersey, Connecticut, Westchester and Long Island and is connected thereto by numerous bridges, tunnels, highways and streets. On all of the roads of ingress and egress to the City of New York there are hundreds of points of retail distribution of gasoline, both within and without the city and state boundary lines.

(h) Operators of motor vehicles fill the gasoline tanks of said vehicles with gasoline inside or outside the City of New York with no preconceived limitation in its intended use and drive freely in or out of the City and State of New York without regard to whether the gasoline in the tank is authorized for use in the City of New York. Clearly, plaintiffs can have no knowledge of where such gasoline will be used.

27. Thus, the economic pattern of refining, storage, distribution, sale and use of gasoline in the United States has been based upon the public necessity to have gasoline move freely in interstate commerce unsubjected to local legislative restrictions which inhibit or prevent the free movement thereof.

28. (a) It is impossible for plaintiffs to comply with the express provisions of Local Law No. 49 without asking each and every customer where he intends to use the gasoline he is about to purchase.

(b) In order to otherwise comply with the provisions of Local Law No. 49 and thereby avoid the civil and criminal penalties thereunder provided, it will be necessary for plaintiffs to reconstruct, rearrange and reorganize their interstate activities in respect of the refining, storage and distribution of gasoline for motor vehicle use. This will involve (i) changing refining procedures and facilities; (ii) redesigning, rearranging and relocating transportation and storage facilities; and (iii) restructuring interstate distribution patterns and sales procedures at the wholesale and retail level.

(c) All of the foregoing will require extensive modifications in plaintiffs' refining, storage and distribution systems, which will materially increase plaintiffs' cost structure.

29. Thus, compliance with the provisions of Local Law No. 49 will require plaintiffs to undertake costly and extensive modifications in their refining operations in order to produce and to transport special gasolines for use in New York



City in addition to the other grades of gasoline which they currently refine and ship to New York City for sale in surrounding areas.

30. Such costly and extensive modifications would not be required in order to comply with the Federal regulations promulgated by the Administrator of the Federal Environmental Protection Agency and which became effective as of February 9, 1973.

31. In the event plaintiffs fail to comply with Local Law No. 49, plaintiffs would be subject to civil and criminal penalties. Moreover, if plaintiffs fail to comply, defendants could commence an action or proceeding to compel compliance, or to enjoin the sale by plaintiffs of gasoline within the City of New York. Such an injunction would stop the sale of approximately 1,387,250 gallons of gasoline per day and could result in the closing of approximately 1,200 service stations selling plaintiffs' products.

32. The central purpose of the gasoline restrictions contained in Local Law No. 49 is impossible of achievement since no strictly local regulation can effectively control use of gasoline within a particular geographic area within the United States, inasmuch as knowledge of where gasoline is to be used is reposed with the purchaser, and at the time of its purchase even he may not know where such gasoline will eventually be used. Clearly, such controls are impossible except when enforced nationwide by Federal authority.

33. By reason of all of the matters hereinabove alleged, the enactment and enforcement of Local Law No. 49 constitutes an unlawful and impermissible burden upon the inter-

state commerce of the United States in violation of Article I, Section 8, Clause 3 of the Constitution of the United States and in contravention of the Clean Air Act, as amended, and will cause grievous injury to plaintiffs unless enjoined.

WHEREFORE, plaintiffs demand judgment:

(1) Preliminarily and permanently enjoining defendants, their officers, agents, servants, employees, attorneys and persons acting under their authority from:

(a) enforcing or taking any steps to enforce the provisions of Section 1403.2-13.11 or Section 1403.2-13.12 of Local Law No. 49;

(b) imposing any fine or penalty, pursuant to Section 1403.2-15.25 of Local Law No. 49, or any other provision of statutory, regulatory or common law, upon plaintiffs for any noncompliance with Section 1403.2-13.11 or Section 1403.2-13.12 of Local Law No. 49;

(c) enjoining or attempting to enjoin, pursuant to Section 1403.2-15.21 of Local Law No. 49, the purchase, sale, offer for sale, storage or transportation of plaintiffs' gasoline intended for use within the City of New York by reason of any noncompliance with Section 1403.2-13.11 or Section 1403.2-13.12 of Local Law No. 49.

(2) Declaring Section 1403.2-13.11 and Section 1403.2-13.12 of Local Law No. 49 null and void under the Supremacy Clause of the Constitution of the United States and the Clean Air Act, as amended.



(3) Declaring the provisions of Local Law No. 49 regulating the purchase, sale, offer for sale, storage or transportation of gasoline null and void under the Supremacy Clause of the Constitution of the United States and the Clean Air Act, as amended.

(4) Declaring the provisions of Local Law No. 49 regulating the purchase, sale, offer for sale, storage or transportation of gasoline null and void under the Commerce Clause of the Constitution of the United States by reason of the fact that Local Law No. 49 imposes an impermissible burden on interstate commerce.

(5) Granting plaintiffs such other and further relief as to the Court seems just and proper.

SHEA GOULD CLIMENKO & KRAMER

By *Michael J. Kramer*  
A Member of the Firm

Attorneys for Plaintiffs  
Getty Oil Co. (Eastern Operations), Inc.  
Mobil Oil Corporation  
Sun Oil Company of Pennsylvania  
330 Madison Avenue  
New York, New York 10017  
(212) 661-3200

ARTHUR L. VANGELI, ESQ.  
Attorney for Gulf Oil Co.-U.S.  
1290 Avenue of the Americas  
New York, New York  
(212) 562-3300

By SHEA GOULD CLIMENKO & KRAMER  
OF COUNSEL  
*Michael J. Kramer*  
A Member of the Firm

(All papers to be served on  
Shea Gould Climenko & Kramer  
at 330 Madison Avenue  
New York, New York 10017)

97a  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x  
GETTY OIL CO. (Eastern Operations)  
INC., GULF OIL CO. - U.S., MOBIL  
OIL CORPORATION and SUN OIL  
COMPANY OF PENNSYLVANIA,

Plaintiffs,

-against-

THE CITY OF NEW YORK, HERBERT ELISH,  
Environmental Protection Administrator  
of the City of New York, and  
THE ENVIRONMENTAL PROTECTION  
ADMINISTRATION OF THE CITY OF NEW YORK,

Defendants.

:  
: 73 Civ 1093  
: (CES)  
:

: STIPULATION

----- x  
IT IS HEREBY STIPULATED AND AGREED, by and  
between the undersigned, attorneys for the respective  
parties in the above-captioned matter, that the COMPLAINT  
be supplemented and amended by adding the following paragraphs  
marked 11(A) and 12(A):

Paragraph 11. (A) Acting pursuant to Section 211  
of the Clean Air Act (42 U.S.C. §1857f-6c), on or about  
the 28th day of November, 1973, the Federal Environmental  
Protection Agency, by its Acting Administrator John Quarles,  
promulgated an amendment to Part 80, Chapter I, Title 40,  
Code of Federal Regulations. A copy of said amendment is  
attached hereto and marked Exhibit A, and made a part hereof  
as though fully set forth herein.



Paragraph 12.(A) The aforesaid amendment to the Code of Federal Regulations was published in the Federal Register, Vol. 38, No. 234 on December 6, 1973, and became effective on January 7, 1974.

IT IS FURTHER STIPULATED AND AGREED that defendants' time to answer the complaint as supplemented and amended is extended until January 18, 1974

Dated: New York, New York  
January 9, 1974

SHEA GOULD CLIMENKO & KRAMER

By *William A. Kramer*  
A Member of the Firm  
Attorneys for Plaintiffs  
330 Madison Avenue  
New York, New York 10017

OFFICE OF THE CORPORATION COUNSEL

By *John A. Quinn*  
Attorneys for Defendants  
Municipal Building, Civic Center  
Chambers and Center Streets  
New York, New York 10007

SO ORDERED:

*/s/ Charles E. Stewart*  
U.S.D.J.

## RULES AND REGULATIONS

33711

and may be contrasted readily with the requirements of section 202(b) of the Act specifically identifying carbon monoxide, hydrocarbons, and oxides of nitrogen for regulatory action. While, as the commentator points out, language in the Senate Report on its version of the 1970 Clean Air Act amendments stated that the bill would require issuance of a criteria document for lead, this must be construed as only a statement of the Committee's preference, since no such requirement appeared either in the language of the Senate or the conferees' bill.

The regulations promulgated below shall be effective on January 7, 1973.

(42 U.S.C. 1857f-6c, 1857g(a))

Dated: November 23, 1973.

JOHN QUARLES,  
Acting Administrator,  
Environmental Protection Agency.

Part 80 of Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

1. In § 80.1, the second sentence is revised to read as follows:

§ 80.1 Scope.

• • • These regulations are based upon a determination by the Administrator that the emission product of a fuel or additive will endanger the public health, or will impair to a significant degree the performance of a motor vehicle emission control device in general use or which the Administrator finds has been developed to a point where in a reasonable time it would be in general use were such regulations promulgated; and certain other findings specified by the Act.

2. In § 80.2, a new paragraph (m) is added as follows:

§ 80.2 Definitions.

(m) "Lead additive manufacturer" means any person who produces a lead

additive or sells a lead additive under his own name.

3. A new § 80.20 is added as follows:

§ 80.20 Controls applicable to gasoline refiners.

(a)(1) In the manufacture of gasoline at any refinery, no gasoline refiner shall exceed the average lead content per gallon specified below for each 3-month period (January through March, April through June, July through September, October through December):

(i) 1.7 grams of lead per gallon, after January 1, 1975;

(ii) 1.4 grams of lead per gallon, after January 1, 1976;

(iii) 1.0 grams of lead per gallon, after January 1, 1977;

(iv) 0.8 grams of lead per gallon, after January 1, 1978;

(v) 0.5 grams of lead per gallon, after January 1, 1979.

(2) For each 3-month period (January through March, April through June, July through September, October through December) the average lead content per gallon shall be computed by dividing total grams of lead used at a refinery in the manufacture of gasoline by total gallons of gasoline manufactured at such refinery.

(3) For each 3-month period (January through March, April through June, July through September, October through December) commencing with the period January 1, 1975 through March 31, 1975, each refiner shall submit to the Administrator a report showing for each refinery (i) the total grams of lead in lead additive inventory on the first day of the period, (ii) the total grams of lead received during the period, (iii) the total grams of lead in lead additive inventory on the last day of the period, (iv) the total gallons of gasoline produced by such refinery during the period, and (v) the average lead content in each gallon

of gasoline produced during the period. Reports shall be submitted within 15 days after the close of the reporting period, on forms supplied by the Administrator upon request.

(b) The provisions of paragraph (a) (1) (i) and (ii) of this section shall not be applicable to any refiner which does not have more than 30,000 barrels per day crude oil or bona fide feed stock capacity from owned or leased facilities or from facilities made available to such refiner under an arrangement such as, but not limited to, an exchange agreement (except one on a refined product for refined product basis), or a through-put or other form of processing agreement, with the same effects as though such facilities had been leased.

4. A new § 80.25 is added as follows:

§ 80.25 Controls applicable to lead additive manufacturers.

For each 3-month period (January through March, April through June, July through September, October through December) commencing with the period January 1, 1975 through March 31, 1975, each lead additive manufacturer shall submit to the Administrator a report showing the total grams of lead shipped to each refinery by such lead additive manufacturer during the period. Reports shall be submitted within 15 days after the close of the reporting period, on forms supplied by the Administrator upon request.

5. A new § 80.26 is added as follows:

§ 80.26 Confidentiality of information.

Information obtained by the Administrator or his representatives pursuant to this part shall be treated, in so far as its confidentiality is concerned, in accordance with the provisions of 40 CFR Part 2.

[FR Doc. 73-25766 Filed 12-5-73; 8:45 am]



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

GETTY OIL CO. (Eastern Operations),  
INC., GULF OIL CO. - U.S., MOBIL  
OIL CORPORATION, and SUN OIL  
COMPANY OF PENNSYLVANIA,

73 Civ. 1093  
(CES)

ANSWER

Plaintiffs,

-against-

THE CITY OF NEW YORK, HERBERT LLISH,  
Environmental Protection Administrator  
of the City of New York, and THE  
ENVIRONMENTAL PROTECTION ADMINISTRATION  
OF THE CITY OF NEW YORK,

Defendants.

Defendants, by their attorney, ADRIAN P. BURKE,  
Corporation Counsel of the City of New York, answering the  
complaint herein:

1. Deny information and knowledge sufficient  
to form a belief as to the truth of each and every allegation  
contained in paragraph 1, 2, 3 and 4 of plaintiffs' complaint,  
except admit plaintiffs' business is conducted in inter-  
state commerce and within the City of New York.

AS TO COUNT ONE:

2. Deny each and every allegation contained in  
paragraph 15 of plaintiffs' complaint.

3. Deny each and every allegation contained in  
parts (a) and (b) of paragraphs 16 of plaintiffs' complaint,  
except admit that effective August 20, 1971 Local Law  
No. 49 of 1971 added to the Administrative Code a new  
Chapter 57 which is the Air Pollution Control Code, and that  
said Code contains certain specifications concerning the

lead content and other physical characteristics of gasoline offered for sale within the City of New York, which lead restrictions are not identical to regulations promulgated by the Federal Environmental Protection Agency Administrator.

4. Deny each and every allegation contained in paragraph 20 of plaintiffs' complaint, except admit that Local Law No. 49 of 1971 was enacted by the City Council with full knowledge of the federal Clean Air Act and that the terms of the variance granted plaintiffs by the City EPA Administrator on February 16, 1973 are set out in parts (b) (i) and (ii) of said paragraph.

5. Deny each and every allegation contained in paragraph 21 and 22 of plaintiffs' complaint.

AS TO COUNT II OF  
PLAINTIFFS' COMPLAINT:

6. As to paragraph 23 of plaintiffs' complaint, defendants reassert and reallege paragraphs 2, 3, 4 and 5 above of their answer herein.

7. Deny information or knowledge sufficient to form a belief as to the truth of each and every allegation contained in paragraph 26 of plaintiffs' complaint, except admit that New York City is located between the States of New Jersey, and Connecticut, and the counties of Westchester and Nassau in New York State.

8. Deny each and every allegation contained in paragraph 27 of plaintiffs' complaint, except admit that gasoline moves in interstate commerce.



1022

9. Deny each and every allegation contained in paragraphs 28, 29 and 30 of plaintiffs' complaint.

10. Deny information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph 31 of plaintiffs' complaint, except admit that plaintiffs' failure to comply with Local Law No. 49 would subject them to possible criminal and civil penalties and admit that defendants have the power to seek equitable relief in the enforcement of the provisions of Local Law No. 49.

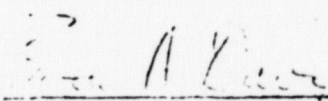
11. Deny each and every allegation contained in paragraphs 32 and 33 of plaintiffs' complaint.

WHEREFORE, defendants demand judgment dismissing plaintiffs' complaint, together with the costs and disbursements of this action.

January 18, 1974

ADRIAN P. BURKE  
Corporation Counsel  
Attorney for Defendants  
1626 Municipal Building  
New York, N.Y. 10007  
566-2515

By

  
\_\_\_\_\_  
EVAN A. DAVIS  
Assistant Corporation Counsel

of Counsel:

EVAN A. DAVIS  
EVELYN J. SORGE

103a

Index No. 72-61693 Year 19.....

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

GETTY OIL CO. (Eastern  
Operations), Inc., et al.,

Plaintiffs,

-against-

THE CITY OF NEW YORK, HERBERT  
ELISH, Environmental  
Protection Administrator of  
the City of New York; et ano.,

Defendants.

ANSWER

~~ADRIAN P. BIRGE~~  
~~NORMAN REDLICH~~

Corporation Counsel,

Attorney for... Defts.

Municipal Building,

New York, N. Y. 10007

Due and timely service of a copy of the  
within  
is hereby admitted.

New York, ..... 19.....

Attorney for

To

Attorney for ..... Esq.,

3-SON 31-100473-2-316

Open RECEIVED  
1974 JUN 18 PM 1:24

SHAW-WALKER  
RECEIVED  
*[Signature]*

To: SHEA, GARD. CLINENCO & KICKWELL

330 Madison Avenue

Attorneys for Plaintiffs

ENTERED

JUN 1974

PROCT. M  
DATE OF MAIL



MEMORANDUM 73 CIV. 1003 (CIV.)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CONY OIL CO. (Plaintiff)  
INC., GULF OIL CO. - U.S., MOBIL  
OIL CORPORATION AND SUN OIL  
COMPANY OF PENNSYLVANIA, Defendants,

-against-

THE CITY OF NEW YORK, HERBERT  
HARRIS, Environmental Protection  
Administrator of the City of New  
York, and THE ENVIRONMENTAL  
PROTECTION ADMINISTRATION OF THE  
CITY OF NEW YORK, Defendants.

ORDER TO SHOW CAUSE

SHEA GOULD CLIMENKO & KRAMER

330 MADISON AVENUE

NEW YORK, N.Y. 10017

NO. 10030

ATTORNEYS FOR DEFENDANTS

CONY OIL CO. (Plaintiff)  
INC., GULF OIL CO. - U.S., MOBIL  
OIL CORPORATION AND SUN OIL  
COMPANY OF PENNSYLVANIA

CONY 10030

STANDARD & CREDIT  
REPORTING

*File 10030  
8 D. Case No. 1-18  
Henderson*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

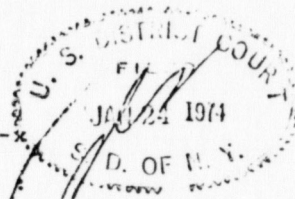
EXXON CORPORATION,

Plaintiff,

-against-

THE CITY OF NEW YORK; ENVIRONMENTAL  
PROTECTION ADMINISTRATION OF THE CITY  
OF NEW YORK; and ADMINISTRATOR OF  
THE ENVIRONMENTAL PROTECTION ADMINIS-  
TRATION OF THE CITY OF NEW YORK,

Defendants.



73 Civ. 1047

(CES)

STIPULATION

**MICROFILM**

JAN 24 1974

IT IS HEREBY STIPULATED AND AGREED by and be-  
tween the undersigned that the Complaint herein is supple-  
mented and amended by the insertion of the following  
paragraphs:

"11a. On December 6, 1973, the Federal Admin-  
istrator prescribed a further control of lead additives  
in gasoline based upon a determination that lead particle  
emissions from motor vehicles present a significant risk  
of harm to the public health. The regulation became  
effective on January 7, 1974 and provides for a comprehen-  
sive, scheduled reduction in the lead content of all gaso-  
line on a nation-wide basis to a final level of 0.5 g/gal.  
after January 1, 1979.

"25a. References in the following demand for  
judgment to §1403.2-13.11(a)(3) and (4) of Chapter 57 of  
the Administrative Code of the City shall be deemed to  
include subsections (a)(1) and (2) of said section."



The execution of this Stipulation by the City of New York is not intended and shall not be construed to constitute an admission by the City of the truth of any or all of the allegations contained in the Complaint as amended herein.

SHEARMAN & STERLING

By /s/ W. Foster Wollen  
A Member of the Firm  
Attorneys for Plaintiff  
Exxon Corporation  
53 Wall Street  
New York, New York 10005  
483-1000

CORPORATION COUNSEL OF  
THE CITY OF NEW YORK

By /s/ Evan A. Davis  
Attorney for Defendants  
1656 Municipal Building  
New York, New York 10007  
566-2091

*So ordered*

*Charles E. Stewart*

*1/23/14*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

RECEIVED

1/21/74

-----x  
EXXON CORPORATION,

Plaintiff,

-against-

THE CITY OF NEW YORK; ENVIRONMENTAL  
PROTECTION ADMINISTRATION OF THE CITY  
OF NEW YORK; AND ADMINISTRATOR OF THE  
ENVIRONMENTAL PROTECTION ADMINISTRATION  
OF THE CITY OF NEW YORK,

Defendants.

FILE-1W  
73 Civ. 1047  
(CES)

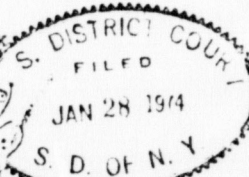
-----x  
GETTY OIL CO. (Eastern Operations), INC.  
GULF OIL CO. - U.S.; MOBIL OIL  
CORPORATION; and SUN OIL COMPANY OF  
PENNSYLVANIA,

Plaintiffs,

-against-

THE CITY OF NEW YORK; HERBERT ELISH,  
Environmental Protection Administrator  
of the City of New York; and the  
ENVIRONMENTAL PROTECTION ADMINISTRA-  
TION OF THE CITY OF NEW YORK,

Defendants.



73 Civ. 1093  
(CES)

STIPULATION OF  
CONSOLIDATION

JAN 28 1974

IT IS HEREBY STIPULATED AND AGREED by and between  
the undersigned that the above-captioned actions be and the  
same hereby are consolidated for all purposes, without pre-  
judice to the rights of any party.

Dated: New York, New York  
January 24, 1974

SHEARMAN & STERLING

By *[Signature]*

A Member of the Firm  
Attorneys for Plaintiff  
Exxon Corporation  
53 Wall Street  
New York, New York 10005  
433-1000



SHEA, GOULD, CLIMENKO & KRAMER

By *Thurston D. Gould*  
Attorneys for Plaintiffs  
Getty Oil Co., Inc.,  
Gulf Oil Co., Mobil  
Oil Corporation, and  
Sun Oil Company of  
Pennsylvania  
330 Madison Avenue  
New York, New York 10017

CORPORATION COUNSEL OF  
THE CITY OF NEW YORK

By *Gary Markman*  
Assistant Corporation Counsel  
Attorney for Defendants  
1655 Municipal Building  
New York, New York 10007  
566-2091

SO ORDERED: *59.024, 1114*

*Charles E. Stewart*  
Charles E. Stewart  
United States District Judge

*Date*

*9*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----	x	
	:	
EXXON CORPORATION,	:	
	:	
Plaintiff,	:	
	:	
v.	:	73 Civ. 1047
	:	(CES)
THE CITY OF NEW YORK, ENVIRONMENTAL	:	
PROTECTION ADMINISTRATION OF THE CITY	:	
OF NEW YORK; and ADMINISTRATOR OF THE	:	
ENVIRONMENTAL PROTECTION ADMINISTRATION	:	
OF THE CITY OF NEW YORK,	:	
	:	
Defendants.	:	
-----	x	
GETTY OIL CO. (Eastern Operations), INC.,	:	
GULF OIL CO. - U.S.; MOBIL OIL	:	
CORPORATION; and SUN OIL COMPANY OF	:	
PENNSYLVANIA,	:	
	:	
Plaintiffs,	:	73 Civ. 1093
	:	(CES)
	:	
THE CITY OF NEW YORK; HERBERT ELISH,	:	
Environmental Protection Administrator	:	
of the City of New York; and the	:	
ENVIRONMENTAL PROTECTION ADMINISTRATION	:	
OF THE CITY OF NEW YORK,	:	
	:	NOTICE OF MOTION
Defendants.	:	
	:	
-----	x	

TAKE NOTICE that upon the summons and complaint, and the exhibits thereto, the affidavit of Robert L. Clare, Jr., a member of the firm of Shearman & Sterling, counsel for plaintiff herein, dated March 9, 1973, the affidavit of Dr. Raymond J. Campion, research associate for plaintiff, dated March 9, 1973, and the exhibits annexed thereto, the affidavit of Richard A. Rabinow, supervisor of economic planning at plaintiff's Bayway Refinery, dated March 9, 1973, the affidavit of George J. Wade, a member of the firm of Shearman & Sterling, dated March 15,



1973, and the affidavit of Kent Sinclair, Jr., associated with the firm of Shearman & Sterling, dated January 25, 1974, and upon all the prior proceedings had herein, the undersigned will move before this Court at Room 318 of the United States Courthouse, Foley Square, New York, New York, on the 4th day of February, 1973 at 10 A.M. or as soon thereafter as counsel can be heard, or at such other date and time as the court may designate, for an Order, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, granting summary judgment for plaintiff with respect to Count I of the complaint herein upon the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to judgment as a matter of law with costs and disbursements.

Dated: New York, New York  
January 25, 1974

SHEARMAN & STERLING

By 

A Member of the Firm  
Attorneys for Plaintiff  
Exxon Corporation  
53 Wall Street  
New York, New York 10005  
(212) 483-1000

TO: Corporation Counsel of  
The City of New York  
Attorneys for Defendants  
1656 Municipal Building  
New York, New York 10007

Shea, Gould, Climenko & Kramer  
Attorneys for plaintiffs  
Getty Oil Co., Inc.,  
Gulf Oil Co., Mobil  
Oil Corporation, and  
Sun Oil Company of  
Pennsylvania  
330 Madison Avenue  
New York, New York 10017

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----	x	
	:	
EXXON CORPORATION,	:	
	:	
Plaintiff,	:	
	:	
v.	:	73 Civ. 1047
	:	(CES)
THE CITY OF NEW YORK, ENVIRONMENTAL	:	
PROTECTION ADMINISTRATION OF THE CITY	:	
OF NEW YORK; and ADMINISTRATOR OF THE	:	
ENVIRONMENTAL PROTECTION ADMINISTRATION	:	
OF THE CITY OF NEW YORK,	:	
	:	
Defendants.	:	
-----	x	
GETTY OIL CO. (Eastern Operations), INC.,	:	
GULF OIL CO. - U.S.; MOBIL OIL	:	
CORPORATION; and SUN OIL COMPANY OF	:	
PENNSYLVANIA,	:	
	:	
Plaintiffs,	:	73 Civ. 1093
	:	(CES)
	:	
THE CITY OF NEW YORK; HERBERT ELISH,	:	AFFIDAVIT IN
Environmental Protection Administrator	:	SUPPORT OF
of the City of New York; and the	:	PLAINTIFF'S
ENVIRONMENTAL PROTECTION ADMINISTRATION	:	MOTION FOR
OF THE CITY OF NEW YORK,	:	<u>SUMMARY JUDGMENT</u>
	:	
Defendants.	:	
-----	x	

STATE OF NEW YORK     )  
                              :  
COUNTY OF NEW YORK    )

Kent Sinclair, Jr., being duly sworn, deposes  
and says:

1. I am associated with the firm of Shearman  
& Sterling, attorneys for plaintiff Exxon Corporation and  
I submit this affidavit in support of plaintiff's motion  
pursuant to Rule 56 of the Federal Rules of Civil Pro-  
cedure for an Order granting summary judgment to Exxon  
with respect to Count I of its amended complaint.



2. Plaintiff commenced an action against defendants seeking permanent injunctive and declaratory relief on March 9, 1973. At the same time, plaintiff moved, by way of order to show cause, for a preliminary injunction barring defendants, inter alia, from enforcing the provisions of § 1403.2-13.11(a)(3) and (4) of Chapter 57 of the Administrative Code of the City of New York. That motion, as well as the present summary judgment motion, was based on the federal preemption of the control of lead as a fuel additive.

3. Congress has specifically preempted state and local law with regard to the control or prohibition of any fuel or fuel additive. The Clean Air Act Amendments of 1970 provide that Federal action in prescribing controls regulating a fuel or fuel additive preempts all state or local regulation of that fuel or additive unless the state or local control is identical to the controls prescribed by the Federal E.P.A. 42 U.S.A. § 1857f-6c.

4. The Administrator of the Federal E.P.A., acting pursuant to his Congressional mandate, has prescribed federal controls over the use of lead as a fuel additive. The first set of Federal lead regulations, promulgated January 10, 1973 was designed to prevent impairment of the performance of a motor vehicle emission control device. (38 F.R. 1255). On December 6, 1973, the Federal Administrator prescribed a further control of lead additives in gasoline based upon a determination that lead particle emissions from motor vehicles present a significant risk of harm to the public health. The regulation became effective on January 7, 1974 and provides for a comprehensive, scheduled reduction in the lead content of all gaso-

line on a nation-wide basis to a final level of 0.5 g/gal. after January 1, 1979.

5. I have been informed and am of the belief that the proposed gasoline lead provisions in the New York State Air Quality Implementation Plan have been deleted and that no alternative lead restrictions have been proposed or adopted by the State Department of Environmental Conservation or submitted to or approved by the Federal E.P.A.

6. As is set forth more fully in the memorandum of law in support of plaintiff's motion for a preliminary injunction and the memorandum of law in support of the instant motion, this federal statutory and regulatory action with regard to the control of lead as a fuel additive has preempted state and local control of lead additives whether such regulations be designated as protection for an emission control device or the public health. Thus, I submit that defendants are barred from enforcing New York City's lead restrictions under the mandate of the Supremacy Clause of the United States Constitution. Count I of plaintiff's complaint seeks a declaration that the City's lead restrictions are null and void by operation of the Supremacy Clause.

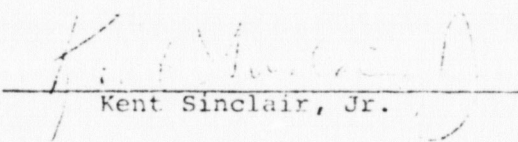
7. New York City is presently attempting to control and ultimately prohibit the use of lead as a fuel additive in a manner which is completely divergent from the federal controls. Answer, ¶7; see § 1403.2-13.11, Chapter 57 of the Administrative Code of the City of New York.

8. As is more fully set forth in the affidavits and memorandum of law in support of plaintiff's motion for

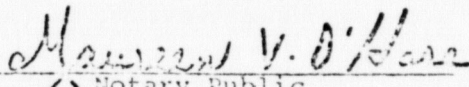


a preliminary injunction, absent prompt disposition of plaintiff's request for permanent injunctive and declaratory relief by this Court, plaintiff is confronted with the insoluble dilemma of costly compliance with an onerous local law which plaintiff believes to be invalid or non-compliance with that law at the risk of substantial civil and criminal penalties.

9. There can be no genuine issue as to any material fact alleged in Count I. Congress has expressly directed itself to the preemption issue and barred state and local control of any fuel or fuel additive upon specific action by the Administrator of the Federal Environmental Protection Agency. The Federal Administrator has prescribed two specific sets of controls over the use of lead as a fuel additive. Defendants seek to enforce a lead restriction which is not identical to, indeed, is materially at variance with, the applicable Federal controls. As a matter of law, plaintiff submits it is entitled to summary judgment with respect to Count I of the complaint.

  
Kent Sinclair, Jr.

Sworn to before me this  
25th day of January, 1974

  
Notary Public

HOWARD V. O'HARA  
Notary Public, State of New York  
Exp. 24-01-1975  
Qualified in New York County  
Certificate Recd. in New York County  
Commission Expires Jan 30, 1975

73 Civ. 1047 (CES)  
73 Civ. 1093 (CES)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

EXXON CORPORATION,

Plaintiff,

v.

THE CITY OF NEW YORK, ENVIRONMENTAL  
PROTECTION ADMINISTRATION OF THE  
CITY OF NEW YORK; and ADMINISTRATOR  
OF THE ENVIRONMENTAL PROTECTION  
ADMINISTRATION OF THE CITY OF  
NEW YORK,

Defendants.

GETTY OIL CO. (Eastern Operations),  
INC., GULF OIL CO. - U.S.; MOBIL  
OIL CORPORATION; and SUN OIL COM-  
PANY OF PENNSYLVANIA,

Plaintiffs,

v.

THE CITY OF NEW YORK; HERBERT ELISH,  
Environmental Protection Adminis-  
trator of the City of New York;  
and the ENVIRONMENTAL PROTECTION  
ADMINISTRATION OF THE CITY OF  
NEW YORK,

Defendants.

MOTION FOR SUMMARY JUDGMENT  
RULE 9(g) STATEMENT  
AFFIDAVIT

Shearman & Sterling  
53 Wall Street  
New York, N. Y. 10005

403-1000

RECEIVED  
1974 JAN 28 AM 9:23  
SHEARMAN & STERLING  
RECEIVED

1/29/74



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

EXXON CORPORATION,

Plaintiff,

73 Civ. 1047  
(CES)

-against-

THE CITY OF NEW YORK, ENVIRONMENTAL  
PROTECTION ADMINISTRATION OF THE CITY  
OF NEW YORK; and ADMINISTRATOR OF  
THE ENVIRONMENTAL PROTECTION ADMINIS-  
TRATION OF THE CITY OF NEW YORK,

Defendants.

CITY OIL CO. (Eastern Operations),  
INC., GULF OIL CO. - U.S.; MOBIL  
OIL CORPORATION; and SUN OIL COMPANY  
OF PENNSYLVANIA,

73 Civ. 1093  
(CES)

Plaintiffs,

-against-

THE CITY OF NEW YORK; HERBERT BLISH,  
Environmental Protection Adminis-  
trator of the City of New York;  
and the ENVIRONMENTAL PROTECTION  
ADMINISTRATION OF THE CITY OF NEW YORK,

Defendants.

AFFIDAVIT IN  
OPPOSITION TO  
MOTIONS FOR  
SUMMARY JUDGMENT

STATE OF NEW YORK )  
: SS.:  
COUNTY OF NEW YORK )

EVELYN J. JUDGE, being duly sworn, deposes and  
says:

1. I am an Assistant Corporation Counsel in the  
Law Department of the City of New York and submit this  
affidavit in opposition to plaintiffs' motions for summary  
judgment.

2. Exxon Corporation commenced a civil action against defendants for permanent injunctive and declaratory relief on March 2, 1973. Count I of that complaint as amended sets forth a claim for relief under the supremacy clause of the United States Constitution, alleging that restrictions, found in §1403.2-13.11 of the New York City Administrative Code, on the lead content of gasoline sold in New York City, have been preempted by federal regulations published on January 10, 1973 and December 6, 1973 concerning the lead content of gasoline. On January 25, 1974 Exxon moved for summary judgment on Count I of its complaint.

3. On March 14, 1973 plaintiffs Getty Oil Co. (Eastern Operations), Inc., Gulf Oil Co. - U.S., Mobil Oil Corporation and Sun Oil Company of Pennsylvania (hereinafter "Getty plaintiffs") commenced a civil action seeking the same relief as Exxon and, in addition, seeking to bar defendants from enforcing §1403.2-13.12 of the Administrative Code which limits the volatility of gasoline sold in New York City. On January 24, 1974 Getty plaintiffs moved by order to show cause for summary judgment on Count I of their complaint, alleging that the aforementioned City lead and volatility restrictions were preempted by federal lead regulations promulgated December 6, 1973 and hence void under the supremacy clause of the Constitution.

4. Defendants do not dispute the following facts upon which plaintiffs' motions for summary judgment are based.

(a) On January 10, 1973 the federal Administrator published a motor vehicle emission control device standard regulation for



lead in gasoline, to become effective February 9, 1973. Generally, this regulation requires that gas stations provide at least one pump of lead free gasoline after July 1, 1974. This regulation was promulgated pursuant to §211(c)(1)(B) of the Clean Air Act, 42 U.S.C. §1857f-6c (c)(1)(B).

(b) On December 6, 1973 the acting federal Administrator promulgated a regulation pursuant to §211(c)(1)(A) of the Clean Air Act, 42 U.S.C. §1857f-6c(c)(1)(A), setting prospective restrictions on the lead content of gasoline for purposes of protecting the public health and welfare. This regulation became effective on January 7, 1974 and provides for an annual staged reduction in the lead content of gasoline from 1.7 g/gal after January 1, 1975 to 0.5 g/gal after January 1, 1979.

(c) The aforementioned lead regulations promulgated by the federal Administrator contain no provision whatsoever as to volatility limits of gasoline.

(d) The restrictions on the lead content and volatility limits of gasoline found in the Administrative Code are health standards enacted pursuant to the local police power and are not identical to the aforementioned federal health regulation.

(e) Plaintiffs claim for pre-emption is based upon §211(c) (4) (A) (ii) of the Act, 42 U.S.C. §1857f-6c(c) (4) (A) (ii) which in pertinent part provides that a political subdivision of a State may not enforce a control or prohibition respecting use of a fuel or fuel additive if the federal Administrator "has prescribed under ... a control or prohibition applicable to such fuel or fuel additive, unless State prohibition or control is identical to the prohibition or control prescribed by the Administrator."

5. As is more fully set out in "Defendants' Memorandum In Opposition To Plaintiffs' Motion For Summary Judgment", although there is no disagreement as to the material facts herein, plaintiffs are not entitled to summary judgment as a matter of law. For notwithstanding the fact that the federal Administrator has published



regulations concerning the lead content of gasoline, which regulations are presently in effect, plaintiffs have failed to establish the statutory requisite of preemption, namely, that there is presently in effect a federal control applicable to either the lead content or the volatility limits of gasoline. The controls announced in the regulations prescribed by the Administrator are not applicable until January 1, 1975, so it is not until then that the City's lead content restrictions are preempted.

*Everlyn J. George*  
 EVERLYN J. GEORGE

Sworn to before me this  
 1st day of February, 1974

*Robert H. H. H.*  
 ROBERT H. H. H.  
 Notary Public  
 County of New York  
 City of New York  
 Commission Expires March 22, 1975

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
EXXON CORPORATION,

Plaintiff,

73 Civ. 1047  
(CES)

v.

THE CITY OF NEW YORK, ENVIRONMENTAL  
PROTECTION ADMINISTRATION OF THE CITY  
OF NEW YORK; and ADMINISTRATOR OF THE  
ENVIRONMENTAL PROTECTION ADMINISTRATION  
OF THE CITY OF NEW YORK,

Defendants.

-----x  
GETTY OIL CO. (Eastern Operations), INC.,  
GULF OIL CO. - U.S.; MOBIL OIL  
CORPORATION; and SUN OIL COMPANY OF  
PENNSYLVANIA,

73 Civ. 1093  
(CES)

Plaintiffs,

THE CITY OF NEW YORK; HERBERT ELISH,  
Environmental Protection Administrator  
of the City of New York; and the  
ENVIRONMENTAL PROTECTION ADMINISTRATION  
OF THE CITY OF NEW YORK,

AFFIDAVIT IN  
SUPPORT OF  
DEPENDANTS'  
OPPOSITION TO  
MOTIONS FOR  
SUMMARY JUDGE-  
MENT

Defendants.

-----x  
STATE OF NEW YORK     )  
                              : SS.:  
COUNTY OF NEW YORK    )

William Shapiro being duly sworn, deposes and  
says:

1. I am an Assistant to the Commissioner of  
the New York City Department of Air Resources. I hold a  
Bachelor's Degree of Chemical Engineering cum laude from  
the City College of New York, and a Master's degree in



Chemical Engineering with a minor in Air Pollution from New York University.

2. I am familiar with the lead in gasoline regulations found in Part 30 of Chapter I, Title 40 of the Code of Federal Regulations as now in effect. I am also familiar with the lead content of gasoline restrictions and gasoline volatility limits found in § 1403.2-13.11 and 13.12 of the New York City Administrative Code.

3. Volatility limits on gasoline refers to the case of gasoline evaporation.

4. Volatility is restricted under § 13.12 because evaporated hydrocarbons are emitted into the ambient air. Among other effects of these ambient hydrocarbons, their combination with oxides of nitrogen or other oxidants can produce photo-chemical smog.

5. Gasoline volatility is generally limited by removing the butane-pentane ( $C_4C_5$ ) fraction. This cut is then replaced by another hydrocarbon fraction with a lower front end volatility. Examples of such hydrocarbon fractions are: catalytic gasoline extract; heavy reformat; light straight run; naptha; virgin naptha; heavy virgin naptha; reformat; alkylate. The result of lowering volatility in this manner is gasoline with a higher evaporation curve and in most cases a slight increasing of the octane rating of the gasoline.

6. In no instance is lead used to replace the  $C_4 C_5$  fraction.

7. Lead is added to gasoline to upgrade octane rating and has no effect on gasoline volatility, in and of itself. However, to the extent that decreased volatility results in increased octane, less lead or substitutes for lead is needed to produce the gasoline with the required octane rating.

8. In my opinion, restrictions on the lead content of gasoline have no effect, and indeed may not be compared to limits on gasoline volatility.

*William Shapiro*  
WILLIAM SHAPIRO

Sworn to before me

this 31st day of January, 1974.

*Robert J. DeLeon*  
Notary Public

Notary Public  
State of New York  
Commission Expires March 23, 1975



1047 (CES)  
1093 (CES) Year 19 73  
Index No.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

EXXON CORPORATION,  
Plaintiff,

-against-  
THE CITY OF NEW YORK, etc.,  
et al.,  
Defendants.

GETTY OIL CO., etc., et al.,  
plaintiffs,

-v-  
THE CITY OF NEW YORK, et al.  
Defendants.

AFFIDAVITS IN OPPOSITION  
TO MOTIONS FOR SUMMARY  
JUDGMENT

**KLEEFERMAN, KIN,**  
**ADRIAN P. BURKE**  
Corporation Counsel,  
Attorney for City of N.Y.  
Municipal Building,  
New York, N.Y. 10007

Due and timely service of a copy of the  
within  
is hereby admitted.

New York, 19 10

Attorney for

To

Attorney for

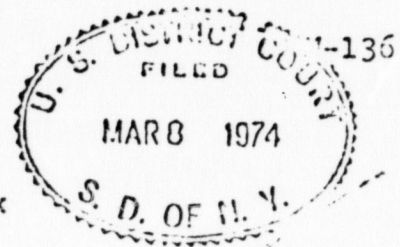
Esq.,

COPI RECEIVED

1974 FEB -4 PM 1:40

SHIRLEY M. COLEMAN, CLERK  
RECEIVED  
6/3/74  
City of New York

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



----- x  
EXXON CORPORATION,

Plaintiff,

-against-

73 Civ. 1047

THE CITY OF NEW YORK; ENVIRONMENTAL  
PROTECTION ADMINISTRATION OF THE CITY  
OF NEW YORK; and ADMINISTRATOR OF THE  
ENVIRONMENTAL PROTECTION ADMINISTRA-  
TION OF THE CITY OF NEW YORK,

Defendants.  
----- x

GETTY OIL CO. (Eastern Operations), INC.;  
GULF OIL CO. - U.S.; MOBIL OIL CORPO-  
RATION; and SUN OIL COMPANY OF  
PENNSYLVANIA,

Plaintiffs,

-against-

73 Civ. 1093

THE CITY OF NEW YORK; HERBERT ELISH,  
Environmental Protection Administrator  
of the City of New York; and THE  
ENVIRONMENTAL PROTECTION ADMINISTRA-  
TION OF THE CITY OF NEW YORK,

Defendants.  
----- x

MEMORANDUM

STEWART, DISTRICT JUDGE:

Plaintiffs have moved for a summary judgment on the ground that the Federal Regulation of Fuels and Fuel Additives, 36 Fed. Reg. 33734 (Dec. 6, 1973) (hereinafter Dec. 6, 1973 Regulations) has preempted Sections 1403.2-13.11 and 13.12 of the Administrative Code of the City, which prescribe the maximum



lead content and volatility limits of regular and premium grade gasoline sold in New York City. The Dec. 6, 1973 Regulations, promulgated by the Administrator for the Federal Environmental Protection Agency (EPA) (hereinafter Federal Administrator) pursuant to 42 U.S.C. §1857f-6(c)(1)(A), set certain national limitations on the lead content in gasoline as of January 1, 1975. Whether the Dec. 6, 1973 Regulations presently preempt Sections 1403.2-13.11 and 13.12 is the question presented by plaintiffs' motion. By stipulation of the parties the Exxon (73 Civ. 1047) and the Getty, et al. (73 Civ. 1093) cases have been consolidated for all purposes.

Background.

On March 15, 1973 a hearing was held on plaintiffs' application for preliminary relief to declare Sections 1403.2-12.11 and 13.11 null and void because they had been preempted by the promulgation of the January 10, 1973 federal regulations, and because they violated the commerce clause of the Constitution by discriminating against interstate commerce and by imposing extensive and unreasonable burdens on interstate commerce. By opinion and order of this Court of March 22, 1973 plaintiffs' application was denied.

On March 26, 1973 this Court granted plaintiffs' application for a stay pending appeal and extended the stay on April 10, 1973. Without reaching the merits the Court of Appeals extended the stay conditioned upon the appellants'

readiness to go to trial within 30 days of the filing of its opinion<sup>1/</sup> of May 17, 1973. This case has been dormant since then because both parties expected action by either the State Environmental Administrator or the Federal Administrator to be forthcoming. In the meantime, we understand that the plaintiffs have been complying with the second step of the City's ordinance which requires that on and after January 1, 1972 the lead content for gasoline of all Octane levels be 1.0 grams per gallon. The City has continued to allow compliance at the 1972 reduction level.

Relevant Statutes.

§§1403.2-13.11 and 13.12 of the local ordinance provide that the lead content and other physical characteristics of gasoline sold in New York City comply with certain specifications.<sup>2/</sup>

---

1/ See *Exxon Corp. v. City of New York and Getty Oil Co. v. City of New York*, 480 F.2d 460 (2d Cir. 1973).

2/ §1403.2-13.11 of the New York City Administrative Code provides for the following:

"Lead content of gasoline restricted. - (a)  
No person shall cause or permit the use, or if intended for use in the City of New York, the purchase, sale, offer for sale, storage or transportation of gasoline which contains more than the following amount of lead by weight for the respective octane ranges as follows:



2/ (continued)

	95.9 Octane No. & Above	Below 95.9 Octane No.
(1) On and after November 1, 1971 -----	2.0 grams per gal.	1.5 grams per gal.
(2) On and after January 1, 1972 -----	1.0 grams per gal.	1.0 grams per gal.
(3) On and after January 1, 1973 -----	0.5 grams per gal.	0.5 grams per gal.
(4) On and after January 1, 1974 -----	zero grams	zero grams

"The term octane number shall mean research octane number or rating measured by the research method.

(b) Where the lead content of gasoline is restricted to zero grams per gallon as in subsection a, gasoline which contains 0.375 grams of lead per gallon shall be deemed to meet such restriction."

§1403.2-13.12 provides as follows:

"Volatility limits on gasoline.-- Effective October 1, 1971, no person shall cause or permit the use, or, if intended for use in the City of New York, the purchase, sale, offer for sale, storage or transportation of gasoline which exceeds the following volatility limits:

(a) For the period October 1 through April 30, not to exceed 12 Reid vapor pressure.

(b) For the period May 1 through September 30, not to exceed 7 Reid vapor pressure."

By the 1970 Amendments to the Clean Air Act Congress gave the Federal Administrator the power to set standards either for the purpose of protecting automobile pollution control devices or for the purpose of protecting the public health and welfare. See 42 U.S.C. §1857f-6c(c)(1)(a) and (b).<sup>2/</sup>

Section 211(c)(1)(A) of the Clean Air Act, as amended, 42 U.S.C. §1857f-6c, provides for federal pre-emption of standards for fuel or fuel additives when the Administrator of the Federal Environmental Protection Agency has prescribed standards or has found that no control is

---

3/ 42 U.S.C. §1857f-6c(c)(1)(A) and (B) provide:

The Administrator may, from time to time on the basis of information obtained under subsection (b) of this section or other information available to him, by regulation, control or prohibit the manufacture, distribution into commerce, offers for sale, or sale of any fuel or fuel additive for use in a motor vehicle or motor vehicle engine (A) if any emission products of such fuel or fuel additive will endanger the public health or welfare, or (B) if emission products of such fuel or fuel additive will interfere to a significant degree the performance of any emission control device or system which is in general use, or which the Administrator finds has been developed to a point where in a reasonable time it would be in general use were such regulation to be promulgated.



necessary: <sup>4/</sup> 42 U.S.C. §1857-6c(c)(4)(A)(1) bars local controls "if the Administrator has found that no control or prohibition ... is necessary and has published his finding in the Federal Register." Since the Administrator has found otherwise, plaintiffs do not rely on this section for their preemption argument. 42 U.S.C. §1857-6c(c)(4)(A)(11) provides for preemption "if the Administrator has prescribed under paragraph (1) a control or prohibition applicable to such fuel or fuel additive, unless State prohibition or control is identical to the prohibition or control prescribed by the Administrator."

#### Regulations.

The first regulations promulgated pursuant to §1857f-6c(c)(1)(A) and (B) (January 19, 1973) implemented a lead control standard needed to protect automobile emission

---

4/ 42 U.S.C. §1857f-6c(c)(4)(A)(1) and (11) provide:

Except as otherwise provided in subparagraphs (B) and (C), no state (or political subdivision thereof) may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any control or prohibition respecting use of a fuel or fuel additive in a motor vehicle or motor vehicle engine -

(1) if the Administrator has found that no control or prohibition under paragraph (1) is necessary and has published his findings in the Federal Register, or

(11) if the Administrator has prescribed under paragraph (1) a control or prohibition applicable to such fuel or fuel additive, unless state prohibition or control is identical to the prohibition or control prescribed by the Administrator.

control devices.<sup>5/</sup> On December 6, 1973 the Federal Administrator promulgated an amendment to Part 80, Chapter I, Title 40 of Federal Regulations. See Fed. Reg. 33734-41. These regulations, which set standards from the standpoint of protection of health, became effective January 7, 1974 and generally establish prospective controls applicable as of January 1,

---

5/ See 40 C.F.R. §80.1-.24, 38 Fed. Reg. 1254-56 (January 10, 1973).

40 C.F.R. §80.22 controls are applicable to gasoline retailers and provides: (b) After July 1, 1974, every person who owns, leases, operates, controls, or supervises a retail outlet at which 200,000 or more gallons of gasoline was sold during any calendar year beginning with the year 1971 shall offer for sale at least one grade of unleaded gasoline or not less than 91 Research Octane Number at such retail outlet; provided, however, that the octane number of unleaded gasoline offered for sale in areas where altitude is greater than 2,000 feet may be reduced one (1) octane number for each succeeding 1,000 feet but not more than three (3) octane numbers in total.

(c) After July 1, 1974 every person who owns, leases, operates, controls, or supervises six or more retail outlets shall offer for sale at least one grade of unleaded gasoline of not less than 91 Research Octane Number at no fewer than 60 percent of such outlets; provided, however, that the octane number of unleaded gasoline offered for sale in areas where altitude is greater than 2,000 feet may be reduced one (1) octane number for each succeeding 1,000 feet but not more than three (3) octane numbers in total.

Section 80.2(g) defines "unleaded gasoline" as "gasoline containing not more than 0.05 gram of lead per gallon and not more than 0.005 gram of Phosphorus per gallon."



1975. The controls require the lead content of gasoline be 1.7 gram per gallon after January 1, 1975 to 0.5 gram per gallon after January 1, 1979.

Discussion.

To allow the degradation of the city's air by use of the federal preemption doctrine, when the applicability of that principle in this case is doubtful at best, would be a travesty on the people of New York City. Plaintiffs seek to create a hiatus in the effective control of air quality in New York City in contravention of logic, legal principles and legislative intent. This Court concludes, based upon the following, that the Dec. 6, 1973 Regulations do not preempt sections 1403.2-13.11 and 1403.2-13.12 until January 1, 1975.

While this Court does not pretend to have any independent power to dictate the lead content of gasoline in New York City, it will not approve the dissolution of an otherwise valid local ordinance when no present conflict exists between it and federal standards. As noted above, 42 U.S.C. §1857f-6c(c)(1) gives FEPA the power to "control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive." Congress also provided that no state or subdivision thereof could enforce an emission control prescription not identical with the Federal Administrator's prohibition "applicable to such

fuel or fuel additive ..." 42 U.S.C. §1857f-6c(c)(4)(A). Although the Dec. 6, 1973 Regulations as to lead content in gasoline are presently "effective", no control of lead content in gasoline is applicable until January 1, 1975. The defendant argues that it is only the existence of an applicable control that triggers preemption.

Defendant argues that because the Federal Administrator has chosen to begin the phased reduction of lead content in gasoline on January 1, 1975 does not mean that he determined that no controls are necessary until that time.<sup>6/</sup> Defendant further argues that there is nothing in the Act which prohibits the City from continuing to protect its citizens until federal regulatory controls commence.<sup>7/</sup> Plaintiffs correctly argue that the lead content reduction schedule

---

6/ The regulations address lead pollution as a present problem.

"The resulting new health position paper concluded that airborne lead can either be directly absorbed through the lungs as people breathe, or can settle out of the air to contaminate dust which may be consumed by children. Strong evidence existed which supported the view that through these routes airborne lead contributes to excessive lead exposure in urban adults and children. In light of this evidence of health risks, the Administrator concluded that it would be prudent to reduce preventable lead exposure .... Environmental lead exposure is a major health problem in this country.... Lead from gasoline accounts for approximately 90 percent of airborne lead." 36 Fed. Reg. at 37734.

7/ 92...a.g., *Memoranda Connecting R. Co. v. Pennsylvania* Pub. W. Comm., 373 P.2d 142, 143-44 (3rd Cir. 1957).



set forth in the Dec. 6, 1973 Regulations is set up to moderate the economic and technological impacts of the regulations. But the plaintiffs have already been complying with the standards required by the City's ordinance. The fact that low-lead gasoline is already being provided in New York City is significant in light of the purpose of the Act. The first purpose of the Act is: "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. §1857(b)(1)(1970). Since the city ordinance has been in effect, New York City has made significant progress in improving the quality of its air. To allow New York City's air to be degraded now would violate the very purpose of the Clean Air Act.<sup>3/</sup> The interpretation of the Act must be consistent with its purpose which "is based in important part on a policy

---

<sup>3/</sup> The Senate report on the Clean Air Act Amendment of 1970 states the following: "In areas where current air pollution levels are already equal to, or better than, the air quality goals, the [Administrator] should not approve any implementation plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality." S. Rep. No. 1196, 91st Cong., 2d Sess. 11 (1970). If implementation plans which fail to maintain the existing level of air quality are so frowned upon, this Court deems it improper to cause the lowering of New York City's air quality by a broad application of the preemption doctrine.

of non-degradation of existing clean air." Sierra Club v. Ruckelshaus, 344 F. Supp 253 (D.D.C. 1972), aff'd. by an equally divided Court sub nom; Fri v. Sierra Club, 412 U.S. 451 (1973).

Congress provided that the Federal Administrator would promulgate regulations for fuel additives if he found that the emission products will endanger the public health and welfare. The regulations specifically found such and assert that,

"The scheduled reduction in the use of lead additives in gasoline to achieve a significant reduction in lead emissions from motor vehicles by 1973 is based on the finding that lead particle emissions from motor vehicles present a significant risk of harm to health of urban population, particularly to the health of city children." 36 Fed. Reg. 33734.

Plaintiffs' argument that the Dec. 6, 1973 Regulations were intended to presently invalidate the City's ordinance is not consistent with such a finding. Indeed plaintiffs' arguments are not even supported by the December 6, 1973 Regulation itself which states that "[T]he low-lead regulations will not go into effect until 1975 ..." See 36 Fed. Reg. 33739 Dec. 6, 1973.

2/ These regulations were "effective" as of Jan. 7, 1974. See 36 Fed. Reg. 33741. However, the above quoted passage clearly demonstrates that the word "effective" is an administrative term of art relating to publishing regulations, and the time, notice, etc. For purposes of federal pre-emption such a term of art cannot be used to create a conflict between federal and state regulation until one actually exists. The regulations themselves declare that 1975 is this date.



Therefore, in view of the facts before this Court, the application of the preemption doctrine in this case would be contrary to the Second Circuit's general rule that the preemptive effect of a federal act must be narrowly construed when the exercise of local police power serves the purposes of the federal act. See Chrysler Corp. v. Tofany, 414 F.2d 499 (2d Cir. 1969). Not only has New York City's lead regulations been found to serve the purpose of the Clean Air Act,<sup>10/</sup> but also nowhere in the statutory scheme can there be found Congressional intent to preempt the field of lead reduction for gasoline prior to actual federal control.<sup>11/</sup> Thus plaintiffs have failed to show that there is an inevitable collision between the two schemes of regulation before January 1, 1975.<sup>12/</sup> Indeed, the legislative history of the Clean Air

---

<sup>10/</sup> See Alway Taxi Inc. v. City of New York, 340 F. Supp 1120 (S.D.N.Y. 1972).

<sup>11/</sup> In fact, Congressional judgment has consistently affirmed the importance of state and local control of air pollution ever since Congress first entered the field. "[T]he prevention and control of air pollution at its source is the primary responsibility of state and local governments" and is best implemented at that level. Clean Air Act §101(a)(3), 42 U.S.C. §1957(a)(3) (1970).

<sup>12/</sup> See Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).

Act demonstrates concern that state and local standards provide some measure of control of air pollution until such time as federal controls become applicable. <sup>13/</sup>

The preceding conclusions apply as well to New York City Administrative Code §1403.2-13.12 which controls the volatility content of gasoline. Federal regulations presently do not control volatility standards. In fact,

<sup>13/</sup> The purpose behind the 1970 Amendments giving the federal government more control was not to cause or allow the degradation of the air. Secretary of H&W, Robert Finch, testified that:

"One of the express purposes of the Clean Air Act is 'to protect and enhance the quality of the Nation's air resources'. It will continue to be our view that implementation plans that would permit significant deterioration of air quality in any area would be in conflict with the provisions of the Act. We do not intend to condone 'backsliding'. If an area has air quality which is better than the national standard, they would be required to stay there and not pollute the air even further, even though they may be below national standards."

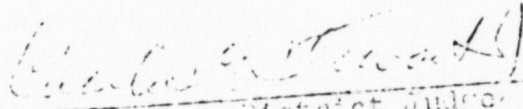
Hearings on S. 3229, S. 466, S. 354b. Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 91st Cong., 2d Sess. (1970), pt. 1, at 143. Although the above statement addresses itself to a different factual situation than the one before this Court, it explicitly sets forth that the general purpose and intention of the federal government's position in air pollution field is to prevent any deterioration of our nation's air quality.



the federal controls are relevant to lead content in gasoline only. The federal regulations do not deal with volatility which is controlled in a manner unrelated to the control of the lead content of gasoline. See affidavit of William Shapiro, Assistant to the New York City Commissioner of Air Resources. There is no basis for a conclusion that the regulations promulgated in the Federal Register for December 6, 1973 by EPA have preempted the City's volatility ordinance.

Based upon the foregoing analysis of the Clean Air Act Amendments of 1970 and of the December 6, 1973 Regulations this Court concludes that plaintiffs have no support for their contention that the new federal regulations preempted and thus invalidated §1403.2-13.11 and 13.12 of New York City's administrative code. Therefore, plaintiffs' motion for summary judgment is hereby denied.

SO ORDERED.

  
United States District Judge

Dated: New York, N. Y.  
March 8, 1974.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

EXXON CORPORATION,

Plaintiff,

: 73 Civ. 1047

-against-

THE CITY OF NEW YORK; ENVIRONMENTAL  
PROTECTION ADMINISTRATION OF THE CITY  
OF NEW YORK; and ADMINISTRATOR OF THE  
ENVIRONMENTAL PROTECTION ADMINISTRA-  
TION OF THE CITY OF NEW YORK,

Defendants.

-----x

GETTY OIL CO. (Eastern Operations), INC.,  
GULF OIL CO. - U.S.; MOBIL OIL CORPO-  
RATION; and SUN OIL COMPANY OF  
PENNSYLVANIA,

Plaintiffs,

: 73 Civ. 1093

-against-

THE CITY OF NEW YORK; HERBERT ELISH,  
Environmental Protection Administrator  
of the City of New York; and THE  
ENVIRONMENTAL PROTECTION ADMINISTRA-  
TION OF THE CITY OF NEW YORK,

Defendants.

: ORDER TO SHOW CAUSE  
WHY THE ORDER OF  
THIS COURT DATED  
MARCH 8, 1974 SHOULD  
NOT BE AMENDED

-----x

Upon the annexed affidavit of Miles F. McDonald, Esq.,  
a member of the firm of Shea Gould Climenko & Kramer sworn to the  
1<sup>st</sup> day of March, 1974 and upon the pleadings and proceedings  
heretofore had herein the defendants are hereby

ORDERED to show cause before the Hon. Charles E. Stewart,  
United States District Judge for the Southern District of New  
York in Room 2602 at the Federal Court House, Foley Square,  
New York, New York on the 25<sup>th</sup> day of March, 1974, at 10:00 A.M.

CES

DEPARTMENT  
CITY OF NEW YORK  
74 MAR 19 AM 10:30  
OFFICE OF CORPORATION COUNCIL



in the forenoon or as soon thereafter as counsel can be heard why the Order of this Court dated March 8, 1974 should not be amended and supplemented to include the statement required by 28 U.S.C. § 1292(b) to the effect that said Order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation", in order to permit the plaintiffs Getty Oil Co. (Eastern Operations), Inc., Gulf Oil Co. - U.S., Mobil Oil Corporation, and Sun Oil Company of Pennsylvania to make an appropriate application to the United States Court of Appeals for the Second Circuit for leave to appeal to that Court from the Order of this Court dated March 8, 1974, pursuant to Rule 5 of the Fed. R. App. P., and for such other and further relief as this Court deems just and proper and it is further

ORDERED that personal service of a copy of this Order and the papers upon which it is based by delivery to the office of the Corporation Counsel of the City of New York, attorney for the defendants and upon Sherman and Sterling, Esqs. attorneys for the plaintiff Exxon Corporation in this consolidated action on or before 5 o'clock P M. on the 19<sup>th</sup> day of March, 1974 shall be sufficient service thereof.

CES

Dated: New York, New York  
March 15, 1974

S/ Charles E. Stewart  
U. S. D. J.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

EXXON CORPORATION,

Plaintiff,

-against-

THE CITY OF NEW YORK; ENVIRONMENTAL  
PROTECTION ADMINISTRATION OF THE CITY  
OF NEW YORK; and ADMINISTRATOR OF THE  
ENVIRONMENTAL PROTECTION ADMINISTRA-  
TION OF THE CITY OF NEW YORK,

Defendants.

73 Civ. 1047

OFFICE OF CORPORATION COUNSEL

MAR 19 AM 10:36

LAW DEPARTMENT  
CITY OF NEW YORK

-----x  
GETTY OIL CO. (Eastern Operations), INC.  
GULF OIL CO. - U.S.; MOBIL OIL CORPO-  
RATION; and SUN OIL COMPANY OF  
PENNSYLVANIA,

Plaintiffs,

-against-

THE CITY OF NEW YORK: HERBERT ELISH,  
Environmental Protection Administrator  
of the City of New York; and THE  
ENVIRONMENTAL PROTECTION ADMINISTRA-  
TION OF THE CITY OF NEW YORK,

Defendants.

73 Civ. 1093

AFFIDAVIT

-----x  
STATE OF NEW YORK )  
                          ) ss.:  
COUNTY OF NEW YORK )

MILES F. McDONALD, ESQ., being duly sworn, deposes and  
says:

That I am an attorney at law duly admitted to practice  
in this Court and a member of the firm of Shea Gould Climenko &  
Kramer, attorneys for plaintiffs Getty Oil Co. (Eastern Operations),  
Inc., Gulf Oil Co. - U.S., Mobil Oil Corporation, and Sun Oil



Company of Pennsylvania in the above entitled action. I submit this affidavit in support of the plaintiffs instant application for an order requiring the defendants to show cause why the Order of this Court dated March 8, 1974 should not be amended and supplemented to include the statement required by 28 U.S.C. § 1292(b) to the effect that said Order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation", in order to permit the plaintiffs Getty Oil Co. (Eastern Operations), Inc., Gulf Oil Co. - U.S., Mobil Oil Corporation, and Sun Oil Company of Pennsylvania to make an appropriate application to the United States Court of Appeals for the Second Circuit for leave to appeal to that Court from the Order of this Court dated March 8, 1974, pursuant to Rule 5 of the Fed. R. App. P.

This Court by its Order dated March 8, 1974 denied plaintiffs motion for summary judgment on the first cause of action in the complaint, holding that the Clean Air Act Amendments of 1970 and the federal regulations duly promulgated thereunder did not preempt the City of New York from legislating in this area and thus did not invalidate § 1403.2-13.11 and 13.12 of the New York City Administrative Code prior to the first day of January, 1975.

I respectfully submit that substantial grounds exist for a difference of opinion which justifies an appellate review of the issue determined by this Court in its Order of March 8, 1974 and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation.

There can be no question but that this is a case of first impression which vitally affects not only the plaintiffs in this action but the entire automotive fuel industry throughout the United States and is not confined to the local ordinance enacted by the City of New York.

On January 25, 1974 Russell E. Train, Administrator of the Environmental Protective Agency in response to questions proposed by the Hon. Philip A. Hart, United States Senator and Chairman of the Subcommittee on Environment, Committee on Commerce, United States Senate stated:

"Section 211 of the Clean Air Act explicitly provides for the Federal preemption of State regulations 'if the Administrator has prescribed...a control or prohibition applicable to such fuel or fuel additive' unless the State regulation is identical. Exemptions to this general preemption, which do not serve to protect New York's regulations, are limited to California or regulations promulgated pursuant to a State implementation plan. As to the desirability of this preemption, two points are worth noting. First, in formulating its lead regulations, EPA has done its best to thoroughly examine the health effects of lead from gasoline. We feel our regulatory strategy of ordering a phased reduction in the lead content of gasoline represents a prudent response to the problem. Furthermore, these regulations were promulgated in large part to protect the most susceptible subgroup of our major urban centers-- small inner city children living near major roadways. Since these regulations have been designed to protect the population of precisely such areas as New York City, it would appear that the Federal preemption in this case, works no great hardship.

Second, this dilemma of Federal preemption versus State autonomy is almost constant in any attempt to regulate interstate commerce. Here the Congress clearly concluded that where the Federal government takes action to protect the public health, the national interests are best served by allowing Federal preemption of State regulations."



Thus, the person directly charged with the enforcement of the federal legislation in question herein differs with the opinion expressed by this Court in its Order of March 8, 1974. A copy of the question posed by Senator Hart and the answer thereto is attached hereto as Exhibit A.

Another contrary opinion has been expressed by the Corporation Counsel of the District of Columbia in a memorandum to William C. McKinney, Acting Director of the Department of Environmental Services. In the course of the memorandum the Corporation Counsel stated:

"The District regulation on lead content reduction differs markedly from the provisions of the fuel controls promulgated by the federal administration. Accordingly, I am of the view that the federal regulations have the effect of preempting the District's regulations thus barring any attempts to enforce § 8:2714(d)."

The Corporation Counsel further stated:

"I understand that currently pending are requests from numerous oil companies for variances from the provision of § 8:2714(d). Since the regulation is now deemed to be unenforceable as a result of federal preemption. I am of the view that no further action is required on the variance requests." (emphasis supplied)

It must be noted that the District of Columbia Health Regulation provided that after January 1, 1974 no gasoline containing more than 2.0 grams of lead per gallon shall be sold.

Should an appeal to the United States Court of Appeals for the Second Circuit be permitted and ultimately result in a determination contrary to that expressed by this Court in its Order of March 8, 1974, this litigation will be terminated and a protracted and costly trial upon the issue of whether or not

Local Law 49 imposes an unreasonable burden on interstate commerce will be avoided.

The State and City of New York are not without appropriate remedies if they are of the belief that the enforcement of Local Law 49 is vital to the health of the people of the City of New York as the Clean Air Act itself provides for methods of securing an exemption from preemption, namely, for the State to obtain a waiver as described in 42 U.S.C. § 1857(f)-6C(c)(4)(B), or for the State to file an implementation plan as described in 42 U.S.C. § 1857(f)-6C(c)(4)(C), which has been approved by the federal administrator. The State of New York has pursued neither alternative.

A denial of this application will in effect prevent even a minimal appellate consideration of a decision which affects not only the plaintiffs but the entire automotive fuel industry in the United States and may result in conflicting determinations in various jurisdictions.

In view of the overall fuel shortage, the difficulties confronting the plaintiffs distribution of gasoline in New York City, and the additional burdens imposed thereon by the Local Law 49 this application is made by way of Order to show cause rather than by the usual notice of motion in order to expedite an application to the United States Court of Appeals for the Second Circuit and to effect, if possible, a prompt minimization of the hardships now caused by the general fuel shortage and by the alterations in the normal distribution pattern required to assure compliance with Local Law 49.



No previous application has been made for the relief sought herein.

WHEREFORE, I respectfully request that the annexed Order to Show Cause be made herein.

*Miles F. McDonald*  
\_\_\_\_\_  
MILES F. McDONALD

Sworn to before me this  
*18th* day of March, 1974.

\_\_\_\_\_  
PRINCENE L. HUTCHERSON  
Notary Public, State of New York  
No. 311000575  
Qualified in New York County  
Commission Expires March 30, 1975

*A R Atkins*  
*From*  
*P F Petrus*

## UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D. C. 20540

OFFICE OF  
ADMINISTRATION

Dear Mr. Chairman:

Enclosed are the responses of the Environmental Protection Agency to your December 4, 1973 questions on our recent lead regulations. Both Mr. Quarles and I appreciated the opportunity to present the views of the Environmental Protection Agency on these regulations. I hope you will find these answers helpful, and if we can be of any further assistance, please do not hesitate to contact us.

Sincerely yours,

Russell E. Train  
Administrator

Honorable Philip A. Hart  
Chairman  
Subcommittee on the Environment  
Committee on Commerce  
United States Senate  
Washington, D. C. 20510

Enclosure

ALL/MLPawls/jmr:1/25/74

AL 6 10,393

Due: Immediately

cc: AXC - 2 cys  
AL Correspondence  
ALL - Lee Pawls  
ALL - Dave Schuenke - 2 cys

EXHIBIT A

PROCESSED

DATE AND

INITIALS

*P. Petrus**1110**2/27/74*

5145



## RESPONSES TO SENATOR HART'S DECEMBER 4, 1973

## QUESTIONS ON EPA LEAD REGULATIONS

QUESTION 1: Is it your view that the regulation announced on November 28 will preempt the more stringent regulation of lead in gasoline by any State or local government, perhaps with the exception of California if granted a waiver? As you know, the City of New York currently has regulations in effect which severely limit the lead content of gasoline. If New York City will now have to give up its regulation or adopt one identical to yours, do you regard this as unfortunate? Are there any conditions under which the States and local governments should be authorized to afford themselves greater protection than EPA might under section 211?

RESPONSE

Section 211 of the Clean Air Act explicitly provides for the Federal preemption of State regulations "if the Administrator has prescribed...a control or prohibition applicable to such fuel or fuel additive" unless the State regulation is identical. Exemptions to this general preemption, which do not serve to protect New York's regulations, are limited to California or regulations promulgated pursuant to a State implementation plan. As to the desirability of this preemption, two points are worth noting. First, in formulating its lead regulations, EPA has done its best to thoroughly examine the health effects of lead from gasoline. We feel our regulatory strategy of ordering a phased reduction in the lead content of gasoline represents a prudent response to the problem. Furthermore, these regulations were promulgated in large part to protect the most susceptible subgroup of our major urban centers: small inner city children living near major roadways. Since these regulations have been designed to protect the population of precisely such areas as New York City, it would appear that the Federal preemption in this case, works no great hardship.

Second, this dilemma of Federal preemption versus State autonomy is almost constant in any attempt to regulate interstate commerce. Here the Congress clearly concluded that where the Federal government takes action to protect the public health, the national interests are best served by allowing Federal preemption of State regulations.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

AND CO. SOUTHERN DISTRICT OF NEW YORK,

Plaintiff,

-against-

THE CITY OF NEW YORK; et al.,  
Defendants.

AND CO. SOUTHERN DISTRICT OF NEW YORK,

Plaintiffs,

-against-

THE CITY OF NEW YORK; et al.,  
Defendants.

RECEIVED AND  
ORDER TO HOLD UNDER

SHEA GOULD CLIMENKO & KRAMER

330 MADISON AVENUE

NEW YORK, N. Y. 10017

MO 1-2200

ATTORNEYS FOR PLAINTIFFS

GOLTY OIL CO.

GULF OIL CO.

MOBILE OIL CORPORATION

AND OIL COMPANY

Pittsburgh, Pa.



## SHEARMAN &amp; STERLING

53 WALL STREET

NEW YORK 10005

(212) 403-1000

CABLE NUMLATUS TELEX ITT 421295 WU 128103

399 PARK AVENUE  
NEW YORK 1002223, RUE ROYALE  
75008 PARIS  
765 10 73  
"NUMLATUS PARIS"  
TELEX 842 6528040 BASINGHALL STREET  
LONDON EC2V 5DE  
01-626 8865  
"NUMLATUS LONDON EC2"  
TELEX 051 084274

March 18, 1974

BY HAND

Honorable Charles E. Stewart  
United States District Judge  
United States Courthouse  
Foley Square  
New York, New York 10007

Exxon, et al. v. The City  
of New York, et al.  
73 Civ. 1047

Dear Judge Stewart:

On behalf of Exxon Corporation, I respectfully request that this Court amend its Order of March 8, 1974 denying summary judgment on Count I of the Complaint so as to include a certification pursuant to 28 U.S.C. § 1292(b) allowing an interlocutory appeal.

The question whether federal preemption has occurred as a result of the adoption of the most recent federal regulations governing the lead content of gasoline appears to be controlling with respect to the allegations of Count I of the Complaint. In light of the authorities cited in our memoranda of law previously submitted in this action and in view of the opinion expressed by Administrator Train of the Federal Environmental Protection Agency that federal preemption of local gasoline lead content regulations had taken place, the question of preemption would certainly seem to be one as to which there is a substantial ground for difference of opinion. Moreover, prompt disposition of such a certified appeal would materially advance the ultimate termination of the litigation in that it may render unnecessary a protracted trial on Count II of the Complaint.


Honorable Charles E. Stewart

2

March 18, 1974

I have been informed that the other plaintiffs in this action have sought a similar certification of an interlocutory appeal and would ask that our request be considered at the same time as theirs.

Very truly yours,

  
Joseph T. McLaughlin

cc: Evelyn J. Junge, Esq.



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

EXXON CORPORATION,

73 Civ. 1947

Plaintiff,

-against-

THE CITY OF NEW YORK; ENVIRONMENTAL  
PROTECTION ADMINISTRATION OF THE CITY  
OF NEW YORK; and ADMINISTRATOR OF THE  
ENVIRONMENTAL PROTECTION ADMINISTRA-  
TION OF THE CITY OF NEW YORK,

Defendants.

GULF OIL CO. (Eastern Operations), INC.,  
GULF OIL CO. - U.S.; MOBIL OIL CORPO-  
RATION; and SUN OIL COMPANY OF  
PENNSYLVANIA,

73 Civ. 1948

Plaintiffs,

-against-

THE CITY OF NEW YORK; MINIST OF ENVIRON-  
MENTAL PROTECTION ADMINISTRATION  
of the City of New York; and THE  
ENVIRONMENTAL PROTECTION ADMINISTRA-  
TION OF THE CITY OF NEW YORK,

Defendants.

AFFIDAVIT OF  
OPPOSITION TO  
REQUEST FOR  
CERTIFICATION  
Pursuant to  
USC 1292(b)

STATE OF NEW YORK        )  
                              :     SS.:  
COUNTY OF NEW YORK     )

LVELYN J. JUDGE, being duly sworn, deposes and  
says:

1. I am an Assistant Corporation Counsel in the  
office of ADRIAN P. BUNDEL, Corporation Counsel, attorney for  
defendants herein, and I am admitted to practice before this  
Court. This affidavit is submitted in opposition to plain-  
tiffs' motion to certify for appeal the Order of this Court

dated March 8, 1974 denying plaintiffs' motions for summary judgment, which motions alleged that the City's restrictions on the lead content of gasoline had been preempted by regulations of the Federal Environmental Protection Administration published in the Federal Register on December 6, 1973. It is respectfully urged that plaintiffs' motion must be denied for failure to comply with the standard for discretionary certification found in 28 U.S.C. 1292 (b).

2. In view of the strong and historical Federal policy against piecemeal appeals, Congress, in amending Section 1292 by adding part (b), which permits certain interlocutory appeals to be taken, emphasized the discretionary nature of the remedy by providing that certification must be approved by both the District Court Judge and the Court of Appeals. See S. Rep. No. 2434, 85th Cong., 2d Sess., 1958 U.S. Code Cong. & Adm. News, 5257. See also Millwright v. Eison Laboratories, 260 F. 2d 431 (3d Cir., 1958). Furthermore, it is clear at least in this circuit that such discretion is to be exercised only in exceptional cases. Gottelman v. General Motors Corporation, 263 F. 2d 194, 196 (1959). See also Leighton v. New York, Susquehanna & Western R. Co., 306 F. Supp. 513, 515 (S.D.N.Y., 1969); Ratner v. Chemical Bank New York Trust Company, 309 F. Supp. 983 (S.D.N.Y., 1970).

3. Beyond the guidelines for the granting of a Section 1292(b) certification as interpreted in this Circuit, it is clear from the statute itself that to make a prima facie case for certification the would-be appellant must show the existence of all three of the prerequisites to certification, namely that there exists a "controlling question of law",



that there is "substantial ground for difference of opinion," as to that law, and that "an immediate appeal from the order may materially advance the ultimate termination of the litigation." It is submitted that plaintiffs have met none of these prerequisites.

4. This case does not involve a "controlling question of law" within the meaning of section 1292(b). In Rohm v. Rosell, Rosell & Wells, 59 F.R.D. 515, 525 (S.D.N.Y., 1973), it was noted that "a question is deemed controlling [under Section 1292(b)] only if it may contribute to the determination, at an early stage of a wide spectrum of cases." (Emphasis added). Under its broadest reading, the decision which plaintiffs seek to have certified provides that local entities may continue to enforce local laws regulating the lead content of gasoline until such time as an actual conflict exists between the local and the federal standards. Thus, it is unlikely that the Court's order will have an effect on a "wide spectrum of cases." Rather, its effect would be limited to litigation turning on an interpretation of Section 211(c)(1)A of the Clean Air Act, as amended, 42 U.S.C. §1857f-6c(c)(1)(A). Furthermore, while in argument before this Court plaintiffs have referred to other governmental entities which regulate the lead content of gasoline, upon information and belief those entities are relatively few in number, and, in any event, plaintiffs have not shown the existence of any litigation which would turn on the question of preemption as decided by this Court. Thus, it is submitted, plaintiffs have not shown that the question of federal preemption on these facts is a "controlling question of law" within the meaning of Section 1292(b).

5. Neither have plaintiffs shown that a substantial basis exists for a difference of opinion on whether the City's lead regulations, or indeed any local regulation of the lead content of gasoline, have been preempted. Plaintiffs cite not a single case interpreting Section 211(c)(1)(B) of the Clean Air Act. The fact that plaintiffs' counsel or of the opinion that the authorities cited in their briefs go counter to this Court's ruling is, of course, not sufficient to establish substantial grounds for difference of opinion.

B & L Dental Supply Co., Inc. v. Bitter Co., 185 F. Supp. 812 (S.D.N.Y., 1960). Furthermore as the legislative history of Section 1292(b) makes clear, mere questions as to the correctness of the Court's ruling are not sufficient to warrant certification. U.S. Code Cong. & Adm. News, supra at 5250.

6. Being unable to show authority contrary to the ruling of this Court, plaintiffs point only to an advisory opinion of the District of Columbia Corporation Counsel and a statement by Federal Environmental Protection Administrator Russell Train as support for the contention of substantial ground for disagreement. The Corporation Counsel's opinion, of course, is not binding on either defendants or this Court, and it is clear that a difference of opinion among city attorneys is not sufficient to constitute "substantial grounds for difference of opinion" within the meaning of Section 1292(b). But even if it were otherwise, it is submitted that the most conspicuous aspect of plaintiffs' reliance on the Washington, D.C. Corporation Counsel's opinion is that notwithstanding allegations of the existence of other local regulation, it is the only opinion that plaintiffs have been



able to submit in support of its position on preemption.

7. Plaintiffs have failed to support their contention that the opinion of Administrator Train, which also is advisory only and thus not a basis for finding a "substantial ground for difference of opinion" "differs with the opinion expressed by this Court" (McDonald affidavit, p. 4) that until such time as the prescribed control becomes applicable, preemption has not occurred. In fact, since Mr. Train justifies preemption (when it occurs) on the ground that the federal regulations "have been designed to protect the population of precisely such areas as New York City," it would appear that he was referring to a time when such regulations become applicable. For it is clear that the City's population will not be protected by a hiatus during which no regulation is applicable.

8. Finally, plaintiffs have not met their burden of showing that an immediate appeal will "materially advance the termination of the litigation." While it is conceivable that a trial on the burden on interstate commerce issue could be lengthy, plaintiffs have made no showing that the docket of the Second Circuit is so uncrowded that the conclusion of such a trial would not occur prior to the time the requested appeal could be determined. Indeed, since the parties to this litigation are under a stay of the Second Circuit which provides that the parties be ready to proceed to trial promptly, it is conceivable that the disposition of this litigation will be delayed rather than advanced by an interlocutory appeal. See, Leighton v. New York, Susquehanna & Western R. Co., *supra*; see also State of Missouri v. Stupp Bros. Bridge & Iron Co., 249 F. Supp. 111 (W.D. Mo., 1966).

WHEREFORE, it is respectfully submitted that plaintiffs have failed to show the prerequisites for certification pursuant to Section 1292(b) and the motion should be denied.

1. John D. Jones  
 2. John D. Jones  
 3. John D. Jones

Sworn to before me this  
19th day of April, 1974.

John Cardia

JOHN CALIA  
History 2-1114, State of New York  
No. 1114-1972 Queens County  
County of Queens, New York County  
Criminal Justice Division March 30, 1976



Index No. ....

Year 19 .....

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

EXXON CORPORATION,  
-against-  
Plaintiff,

THE CITY OF NEW YORK; et al.,  
Defendants.

73 Civ. 1047

GETTY OIL CO. et al.,  
Plaintiff,

THE CITY OF NEW YORK; et al.,  
-against-  
Defendants.  
73 Civ. 1093

AFFIDAVIT IN OPPOSITION TO  
REQUEST FOR CERTIFICATION PUR-  
SUANT TO 28 USC 1292(b)

ADRIAN P. DUPRE

Corporation Counsel,

Attorney for Defendants.

Municipal Building,

New York, N. Y. 10007

Due and timely service of a copy of the  
within  
is hereby admitted.

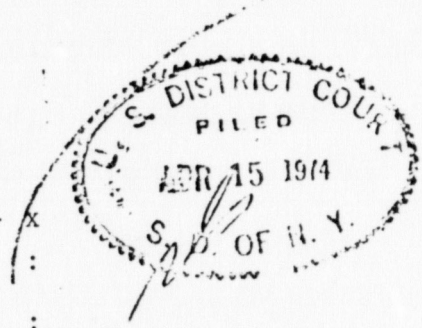
New York, ..... 19 .....

Attorney for

To

Attorney for ..... Esq.,

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



EXXON CORPORATION,

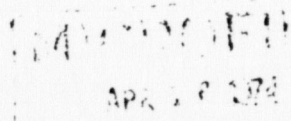
Plaintiff,

73 Civ. 1047

-against-

THE CITY OF NEW YORK; ENVIRONMENTAL  
PROTECTION ADMINISTRATION OF THE  
CITY OF NEW YORK; and ADMINISTRATOR  
OF THE ENVIRONMENTAL PROTECTION  
ADMINISTRATION OF THE CITY OF NEW  
YORK,

Defendants.



GETTY OIL CO. (Eastern Operations),  
INC., GULF OIL CO. - U.S.; MOBIL  
OIL CORPORATION; and SUN OIL COMPANY  
OF PENNSYLVANIA,

Plaintiffs,

73 Civ. 1093

-against-

THE CITY OF NEW YORK; HERBERT ELISH,  
Environmental Protection Administra-  
tor of the City of New York; and THE  
ENVIRONMENTAL PROTECTION ADMINISTRA-  
TION OF THE CITY OF NEW YORK,

Defendants.

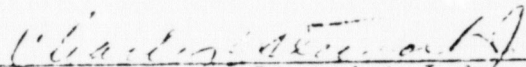
ORDER

Upon consideration of plaintiffs' application  
that this Court amend its Opinion and Order of March 8, 1974  
to include a certification pursuant to 28 U.S.C. §1292(b)  
allowing an interlocutory appeal, and upon consideration of  
the papers submitted by the parties, it is hereby



ORDERED that the Opinion and Order of March 8, 1974 be amended and supplemented to include as the last paragraph the following language: "This order involves a controlling question of law of first impression and an immediate appeal from this order may materially advance the ultimate termination of this litigation."

SO ORDERED.

  
United States District Judge

Dated: New York, N. Y.  
April 15, 1974.

D 41

## UNITED STATES COURT OF APPEALS

Second Circuit



At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 28th day of May, one thousand nine hundred and seventy-four.

Exxon Corporation,  
Petitioner,

v.

The City of New York, Environmental Protection  
Administration of the City of New York; and  
Administrator of the Environmental Protection  
Administration of the City of New York,  
Defendants

Cetty Oil Co., (Eastern Operations), Inc., Gulf  
Oil Co., U.S. Mobil Oil Corporation; and Sun Oil  
Company of Pennsylvania,  
v. Plaintiffs

The City of New York, Herbert Elich, Environmental  
Protection Administrator of the City of New York, et al.  
Defendants.

It is hereby ordered that the motion made herein by counsel for the

~~XXXXXXXXXX~~~~XXXXXXXXXX~~

petitioner

~~XXXXXXXXXX~~

by notice of motion dated ~~XXXXXX~~ filed April 25, 1974 for leave to appeal pursuant to 28 USC §1292(b) and Rule 5 of the Federal Rules of Appellate Procedure

be and it hereby is granted ~~XXXXXX~~

GRANTED.

~~XXXXXXXXXXXXXXXXXXXX~~

I dissent.

Wilfred FeinbergWilliam H. MulliganWilliam H. Timbers Circuit Judges



Two  
COPIES OF THE WITHIN PAPER  
HAVE BEEN RECEIVED AT THE  
COUNSEL  
-928  
COUNSEL

(2) COPY<sup>LES</sup> RECEIVED

AUG 34 1974

SHEARMAN & STERLING

ATTORNEYS FOR *Pitt/ GALT*